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Attorneys for Defendant and Counterclaimant  
UNITED NATIONAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO/OAKLAND DIVISION

INTERSTATE FIRE & CASUALTY  
COMPANY,

**Plaintiff.**

V.

UNITED NATIONAL INSURANCE  
COMPANY and DOES 1 through 10.

## Defendants

**UNITED NATIONAL INSURANCE  
COMPANY,**

#### Cross-complainant,

V.

**INTERSTATE FIRE & CASUALTY  
COMPANY and Roes 1 through 10.**

### Cross-defendants.

Action No.: C 07-04943 MHP

DECLARATION OF THOMAS H. NIENOW  
IN SUPPORT OF UNITED NATIONAL'S  
MOTION FOR LEAVE TO AMEND  
COUNTERCLAIM.

Date: August 18, 2008

Time: 2:00 p.m.

## Courtroom 15

## HONORABLE MARILYN HALL PATEL

1 I, Thomas H. Nienow, declare as follows:

2       1. I am an attorney admitted to practice before this Court and I am of counsel  
3 to Nielsen, Haley & Abbott LLP, counsel of record for defendant and counterclaimant  
4 United National Insurance Company in this action. The following facts are based upon  
5 my personal knowledge and I would competently testify to them if called as a witness.

6       2. A true and correct copy of United National's answer and counterclaim filed  
7 in this action on October 1, 2007, is attached hereto as Exhibit 1.

8       3. True and correct copies of documents bearing Bates numbers IFC000450,  
9 IFC00452-457, and IFC 00459, disclosed by plaintiff and counterdefendant Interstate Fire  
10 & Casualty Company to United National after it filed its answer and counterclaim, are  
11 attached hereto as Exhibit 2.

12       4. True and correct copies of documents bearing Bates numbers IFC00451 and  
13 IFC00458, disclosed by Interstate to United National after United National filed its  
14 answer and counterclaim, are attached hereto as Exhibit 3.

15       5. A true and correct copy of my letter to Interstate's counsel dated May 4,  
16 2008, conveying United Nationals' supplemental Rule 26(a) disclosure is attached hereto  
17 as Exhibit 4.

18       6. A true and correct copy of my letter to Interstate's counsel dated June 2,  
19 2008, conveying Interstate's initial proposed amended answer and counterclaim, and a  
20 stipulation for its filing, is attached hereto as Exhibit 5.

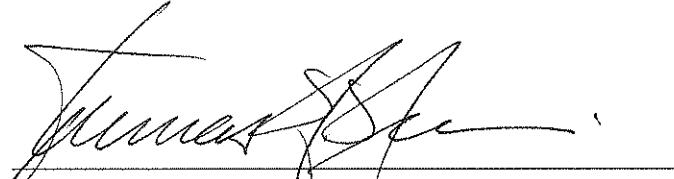
21       7. A true and correct copy of an e-mail from counsel for Interstate to me dated  
22 June 4, 2008, and my responsive e-mail dated June 5, 2008, is attached hereto as Exhibit  
23 6.

24       8. A true and correct copy of the version of United National's amended answer  
25 and counterclaim that I sent to Interstate's counsel on June 4, 2008, and which United  
26 National now seeks leave to file, is attached hereto as Exhibit 7.

27       9. On June 11, 2008, I spoke by telephone with Interstate's counsel,  
28 Christopher Borders, in follow up to my June 5, 2008, e-mail. I asked Borders whether he

1 would stipulate to the filing of United National's amended answer and counterclaim, but  
2 he said that he would not.

3 I declare under penalty of perjury under the laws of the United States that the  
4 foregoing is true and correct. Executed June 20, 2008, at San Francisco, California.

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Thomas H. Nienow

# **Exhibit 1**

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1 JAMES C. NIELSEN (111889)  
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10 Attorneys for Defendant and Counterclaimant  
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE  
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE  
20 COMPANY and DOES 1 through 10.

21 Defendants.

22 UNITED NATIONAL INSURANCE  
23 COMPANY, a Pennsylvania corporation,

24 Cross-complainant,

25 v.

26 FIREMAN'S FUND INSURANCE  
27 COMPANY, a California corporation,  
INTERSTATE FIRE & CASUALTY  
COMPANY, an Illinois corporation, and  
Roes 1 through 10, inclusive,

28 Cross-defendants.

Action No.: C 07-04943 JL

ANSWER AND COUNTERCLAIM OF  
UNITED NATIONAL INSURANCE  
COMPANY.

DEMAND FOR JURY TRIAL.

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## **ANSWER TO COMPLAINT**

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

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1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the  
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of  
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National  
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6 8. Responding to the allegations in paragraph 8 of the complaint, United National is  
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the  
13 complaint.

14 9. Responding to the allegations in paragraph 9 of the complaint, United National is  
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the  
21 complaint.

22 10. Responding to the allegations in paragraph 10 of the complaint, United National is  
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*  
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of  
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005  
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1       11. Responding to the allegations in paragraph 11 of the complaint, United National is  
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty  
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and  
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the  
6 complaint.

7       12. Responding to the allegations in paragraph 12 of the complaint, United National  
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a  
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not  
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for  
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United  
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14       13. Responding to the allegations in paragraph 13 of the complaint, United National  
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17       14. Responding to the allegations in paragraph 14 of the complaint, United National  
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising  
19 that United National had determined that there was no coverage under the United National policy  
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a  
21 claim first made and reported during Interstate Fire & Casualty Company's immediately  
22 preceding policy period, and stating that United National continued to reserve all of its rights  
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,  
24 information or belief to respond to and on that basis denies each, every, and all of the allegations  
25 contained in paragraph 14 of the complaint.

26       15. Responding to the allegations contained in paragraph 15 of the complaint, United  
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1       16. Responding to the allegations in paragraph 16 of the complaint, United National  
2 admits and alleges that the United National policy includes, without the added italics, the policy  
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks  
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and  
5 all of the allegations contained in paragraph 16 of the complaint.

6       17. Responding to the allegations in paragraph 17 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8       18. Responding to the allegations in paragraph 18 of the complaint, United National  
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the  
12 complaint.

13       19. Responding to the allegations in paragraph 19 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
15 and all of the allegations contained in paragraph 19 of the complaint.

16       20. Responding to the allegations in paragraph 20 of the complaint, United National  
17 admits and alleges that the United National policy, which speaks for itself, includes the policy  
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph  
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National  
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22       21. Responding to the allegations in paragraph 21 of the complaint, United National  
23 admits and alleges that the United National policy, which speaks for itself, includes the policy  
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph  
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National  
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28       22. Responding to the allegations in paragraph 22 of the complaint, United National

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1 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
2 alleged, Untied National denies each, every, and all of the allegations contained in paragraph 22  
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National  
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National  
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National  
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.  
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or  
14 belief to respond and on that basis denies each, every, and all of the allegations contained in  
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National  
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National  
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National  
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of  
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

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1 each, every, and all of the allegations contained in paragraph 29 of the complaint.

2       30. Responding to the allegations in paragraph 30 of the complaint, United National  
3 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
4 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
5 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
6 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
7 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
8 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
9 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
10 each, every, and all of the allegations contained in paragraph 30 of the complaint.

11       31. Responding to the allegations in paragraph 31 of the complaint, United National  
12 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
13 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
14 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
15 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
16 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
17 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
18 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
19 each, every, and all of the allegations contained in paragraph 31 of the complaint.

20       32. Responding to the allegations in paragraph 32 of the complaint, United National  
21 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
22 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
23 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
24 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
25 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
26 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 32 of the complaint.

1       33. Responding to the allegations in paragraph 33 of the complaint, United National  
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3       34. Responding to the allegations in paragraph 34 of the complaint, United National  
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13      35. Responding to the allegations in paragraph 35 of the complaint, United National  
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23      36. Responding to the allegations in paragraph 36 of the complaint, United National  
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

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1 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5 37. Responding to the allegations in paragraph 37 of the complaint, United National  
6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
10 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15 38. Responding to the allegations in paragraph 38 of the complaint, United National  
16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17 39. Responding to the allegations in paragraph 39 of the complaint, United National  
18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
19 and all of the allegations contained in paragraph 39 of the complaint.

20 40. Responding to the allegations in paragraph 40 of the complaint, United National  
21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported  
22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted  
23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the  
25 complaint.

26 41. Responding to the allegations in paragraph 41 of the complaint, United National  
27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
3 immediately preceding policy period, and stating that United National continued to reserve all  
4 of its rights under the policy. Except as so admitted and alleged, United National lacks  
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
6 and all of the allegations contained in paragraph 41 of the complaint.

7 42. Responding to the allegations in paragraph 42 of the complaint, United National  
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9 43. Responding to the allegations in paragraph 43 of the complaint, United National  
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11 44. Responding to the allegations in paragraph 44 of the complaint, United National  
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13 45. Responding to the allegations in paragraph 45 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,  
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16 46. Responding to the allegations contained in paragraph 46 of the complaint, United  
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-  
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as  
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to  
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph  
21 46 of the complaint.

22 47. Responding to the allegations in paragraph 47 of the complaint, United National  
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
24 advising that United National had determined that there was no coverage under the Untied  
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
27 immediately preceding policy period, and stating that United National continued to reserve all  
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National  
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National  
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National  
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.  
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50  
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National  
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National  
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.  
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52  
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National  
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National  
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National  
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising  
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United  
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

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1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that United  
2 National had determined that there was no coverage under the United National policy for the  
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first  
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy  
5 period, and stating that United National continued to reserve all of its rights under the policy.  
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55  
8 of the complaint.

9       56. Responding to the allegations in paragraph 56 of the complaint, United National  
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
11 and all of the allegations contained in paragraph 56 of the complaint.

12

13       United National further alleges the following affirmative defenses:

14       1. As and for a first, separate defense, United National alleges that the complaint and  
15 each claim therein do not state facts sufficient to constitute a cause of action against United  
16 National.

17       2. As and for a second, separate defense, United National alleges that the plaintiff  
18 lacks standing to bring this action.

19       3. As and for a third, separate defense, United National alleges that the complaint and  
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
21 exclusions of the alleged United National policy. United National reserves the right to amend its  
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged  
23 United National insurance policy, and/or applicable insurance policy terms, provisions,  
24 conditions, limitations, and exclusions as may become apparent during the continuing course of  
25 discovery in this action.

26       4. As and for a fourth, separate defense, United National alleges that the complaint  
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

1 number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period  
2 January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to  
3 the Complaint to assert any additional defenses arising from the terms of the alleged Interstate  
4 insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations,  
5 and exclusions as may become apparent during the continuing course of discovery in this action.  
6

7 Wherefore United National prays for judgment as follows:

- 8 1. That the Court deny plaintiff's prayers for judicial declarations set forth in the  
9 complaint;
- 10 2. That plaintiff take nothing by its complaint;
- 11 3. That United National be awarded its costs of suit incurred herein;
- 12 4. That United National be awarded its attorneys fees;
- 13 5. For such other and further relief as the Court deems just and proper.
- 14
- 15
- 16

17 **COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,**  
18 **INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

19 Counterclaimant United National Insurance Company, for its counterclaim against  
20 counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and  
21 Roes 1 through 10, inclusive, alleges as follows:  
22

23 **GENERAL ALLEGATIONS**

- 24 1. At all times herein mentioned, United National was and is a Pennsylvania  
25 corporation with its principal place of business in Bala Cynwyd, Pennsylvania.  
26 2. United National is informed and believes and thereon alleges that  
27 counterdefendant Fireman's Fund Insurance Company is a California corporation with its  
28 principal place of business in Novato, California.

1       3.     United National is informed and believes and thereon alleges that  
2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in  
3 California, with its principal place of business in Chicago, Illinois.

4       4.     United National is unable to ascertain the true names and identities of those  
5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of  
6 Court to amend this complaint and all subsequent pleadings to insert the true names and  
7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and  
8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and  
9 Interstate apply equally to Roes 1 through 10.

10      5.     Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §  
11 1367(a).

12      6.     Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because  
13 counterdefendant Fireman's Fund is a resident of this district.

14      7.     United National is informed and believes, and on that basis alleges, that Cirrus  
15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*  
16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New  
17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.  
18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a  
19 medical-malpractice action that was filed on or about September 14, 2005.

20      8.     United National is informed and believes, and on that basis alleges, that the first-  
21 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy  
22 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death  
23 was the subject of the *Tracy* action. United National is informed and believes, and on that basis  
24 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting  
25 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently  
26 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according  
27 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

28      9.     United National is informed and believes, and on that basis alleges, that N.M. Stat.

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1 Ann. § 41-5-15 provides as follows:

2  
3 A. No malpractice action may be filed in any court against a qualifying health  
4 care provider before application is made to the medical review commission  
5 and its decision is rendered.

6  
7 B This application shall contain the following:

- 8  
9 (1) a brief statement of the facts of the case, naming the persons  
10 involved, the dates and the circumstances, so far as they are known,  
11 of the alleged act or acts of malpractice; and  
12  
13 (2) a statement authorizing the panel to obtain access to all medical and  
14 hospital records and information pertaining to the matter giving rise  
15 to the application, and, for the purposes of is consideration of the  
16 matter only, waiving any claim of privilege as to the contents of  
17 those records. Nothing in that statement shall in any way be  
18 construed as waiving that privilege for any other purpose or in any  
19 other context, in or out of court.

20  
21 10. United National is informed and believes, and on that basis alleges, that N.M. Stat.

22 Ann. § 41-5-16 provides as follows:

23  
24 A. Upon receipt of an application for review, the commission's director or his  
25 delegate shall cause to be served a true copy of the application on the  
26 health care providers involved. Service shall be effected pursuant to New  
27 Mexico law. If the health care provider involved chooses to retain legal  
28 counsel, his attorney shall informally enter his appearance with the

1 director.

2  
3 B The health care provider shall answer the application for review and in  
4 addition shall submit a statement authorizing the panel to obtain access to  
5 all medical and hospital records and information pertaining to the matter  
6 giving rise to the application, and, for the purposes of its consideration of  
7 the matter only, waiving any claim of privilege as to the contents of those  
8 records. Nothing in that statement shall in any way be construed as  
9 waiving that privilege for any other purpose or in any other context, in or  
10 out of court.

11  
12 C. In instances where applications are received employing the theory of  
13 respondeat superior or some other derivative theory of recovery, the  
14 director shall forward such applications to the state professional societies,  
15 associations or licensing boards of both the individual health care provider  
16 whose alleged malpractice caused the application to be filed, and the health  
17 care provider named a respondent as employer, master or principal.

18  
19 11. United National is informed and believes, and on that basis alleges, that Interstate  
20 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number  
21 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United  
22 National is informed and believes, and on that basis alleges, that the Interstate policy generally  
23 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of  
24 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

25 12. United National is informed and believes, and on that basis alleges, that the  
26 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

27 I. COVERAGE.

28 The Company will pay on behalf of the Insured all sums which the

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**Insured** shall become legally obligated to pay as **Damages** for **Claims** first made against the **Insured** and reported to the **Company** during the **Policy Period**, as a result of **Bodily Injury**, **Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

- A. on or after the policy effective date shown on the Declarations; or
  - B. at any time prior to the policy effective date shown on the Declarations if:
    - 1. such **incident** happens on or subsequent to the "prior acts date" on the Declarations, and
    - 2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage or Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

\* \* \*

## VI. WHEN CLAIM IS CONSIDERED AS FIRST MADE

**A Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

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All **Claims** arising out of the same or related **incident** shall be considered as having been made at the item the first such **Claim** is made, and shall be subject to the same limit of liability and only a single deductible, if any, shall apply.

\* \* \*

#### IX. DEFINITIONS

When used in this policy (including endorsement forming a part hereof):

“**Bodily Injury**” means bodily injury, sickness or disease, mental anguish, psychological injury or emotional distress sustained by any person, including death at any time resulting therefrom;

“**Claim**” means a demand for money or the filing of **Suit** naming the **Insured** and, in either case, alleging a **Bodily Injury**, **Property Damage** or **Personal Injury** as a result of an **Incident**.

\* \* \*

“**Damages**” means compensatory judgments, settlement or awards but does not include punitive or exemplary **Damages**, fines or penalties, the return of fees or other consideration paid to the **insured**, or the portion of any award or judgment caused by the multiplication of actual **Damages** under federal or state law. However, if a **Suit** is brought against the **Insured** with respect to a **Claim** for alleged acts or omissions falling within the scope of coverage afforded by this insurance seeking both compensatory and punitive or exemplary **Damages**, then the Company will afford a defense to such action, without liability however, for payment of such punitive or exemplary damages;

\* \* \*

“**Incident**” means any act or omission in the rendering of or failure to

1 render services by the **Insured**, or by any person for whom the **Insured** is  
2 legally responsible, in the conduct of the business or professional  
3 occupation specified in the Declarations.

4 Any such act or omission together with all related acts or omissions shall  
5 be considered one “**Incident**” and be subject to the same limit of liability;

6 \* \* \*

7 “**Suit**” means a civil proceeding in which **Damages** because of **Bodily**  
8 **Injury, Property Damage or Personal Injury** to which this insurance  
9 applies are alleged. “**Suit**” includes:

- 10 A. an arbitration proceeding in which such **Damages** are claimed and  
11 to which the **insured** must submit or does submit with the  
12 Company’s consent; or  
13 B. any other alternative dispute resolution proceeding in which such  
14 **Damages** are claimed and to which the **Insured** submits with the  
15 Company’s consent.

16 13. United National issued to Cirrus as named insured a claims-made-and-reported  
17 professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with  
18 policy number AH-0000267 (the “United National policy”)

19 14. The United National policy states as follows:

20 [From Form CPA-119(2.2005):]

## 21 SECTION I—PROFESSIONAL LIABILITY COVERAGE

### 22 1. Insuring Agreement

23 We will pay those sums that the insured becomes legally obligated to pay  
24 as “compensatory damages” as a result of a “wrongful act.” This insurance  
25 applies to injury only if a “claim” for damages to which no other insurance  
26 applies, because of the injury is first made against the insured and reported  
27 to us during the “policy period.” This insurance does not apply to injury  
28 caused by a “wrongful act” that takes place outside of the “covered

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territory" or was committed before the Retroactive Date shown in the Declarations or after the "policy period."

a. A "claim" by a person or organization seeking damages will be deemed to have been made when notice of such "claim" is received and recorded by the insured or by us, which ever comes first;

\* \* \*

c. We will have the right and duty to select counsel and to defend any "suit" seeking damages. However, we will have no duty to defend the insured against any "suit" seeking damages for injury to which this insurance does not apply

\* \* \*

## 2. Exclusions

This insurance does not apply to:

\* \* \*

s. Any "claim," "suit," or "wrongful act" that might result in a "claim" or "suit," of which any insured had knowledge or could have reasonably foreseen, at the signing date of the application for this insurance.

\* \* \*

## SECTION V—PROFESSIONAL LIABILITY CONDITIONS

\* \* \*

### 4. Other Insurance

If other valid and collectible insurance with any other insurer is available to the insured covering a "claim" also covered hereunder (except insurance purchased to apply in excess of the limit of liability hereunder), this insurance will be excess of, and not contribute with, such insurance. If the insured has other coverage with us covered a "claim" also covered by this policy or coverage Part, the insured must elect which policy or Coverage

1                   Part will apply and we will be liable under the Coverage Part so elected  
2                   and will not be liable under any other policy or Coverage Part.

3                   \* \* \*

4                   **5. Representations**

5                   By accepting this policy, you agree:

- 6                   a.         The statements in the Declarations and application, made part of  
7                   this policy, are accurate and complete;  
8                   b.         Those statements are based upon representations you made to us;  
9                   c.         We have issued this policy in reliance upon your representations;  
10                   and  
11                   d.         This policy embodies all of the agreements existing between you  
12                   and us or any of our agents relating to this insurance.

13                   \* \* \*

14                   **SECTION VI—DEFINITIONS**

15                   \* \* \*

- 16                   3.         “Bodily injury” means bodily injury, sickness or disease sustained by a  
17                   person, including death resulting from any of these at any time.  
18                   4.         “Claim” means a written demand upon the insured for “compensatory  
19                   damages,” including, but not limited to, the service of “suit” or institution  
20                   of arbitration proceedings against the insured. “Claim” includes reports of  
21                   accidents, acts, errors, occurrences, offenses or omissions which may give  
22                   rise to a “claim” under this policy. “Claims” based on or arising out of the  
23                   same act or interrelated acts of one or more insured will be considered to  
24                   be based on a single “wrongful act.”

25                   \* \* \*

- 26                   11.        “Suit” means a civil proceeding in which damages for injury to which this  
27                   insurance applies are alleged. “Suit” includes an arbitration proceeding  
28                   alleging such damages to which you must submit or submit with our

1 consent.

2 12. “Wrongful act” means any act, error or omission in the furnishing of  
3 professional social services. It includes the furnishing of food, beverages,  
4 medications or appliances in connection with those services. All  
5 “wrongful acts” committed in the furnishing of professional social services  
6 to any one person will be considered one “wrongful act.” All interrelated  
7 “wrongful acts” of one or more insured will be considered one “wrongful  
8 act.”

9  
10 [From Form EPA-909 (5/2006):]

11 This endorsement modifies insurance provided under the following:

12 PROFESSIONAL LIABILITY COVERAGE PART

13 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the  
14 following:

15 12. “Wrongful act” means:  
16     a. any act or omission in the furnishing of healthcare services  
17         to a patient or client including the furnishing of food,  
18         beverages, medications, medical treatment or appliances in  
19         connection with such services and the postmortem handling  
20         of human bodies.  
21     b. All “wrongful acts” committed in the furnishing of services  
22         to any one patient or client will be considered one  
23         “wrongful act.” All interrelated “wrongful acts” of one or  
24         more insured will be considered one “wrongful act.”

25  
26 15. United National is informed and believes, and on that basis alleges, that Interstate  
27 and/or Fireman’s Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*  
28 pursuant to the terms and provisions of the Interstate policy.

1                   FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

2       16.      United National incorporates by reference the allegations of paragraphs 1-15 of  
3      this counterclaim.

4       17.      An actual controversy has arisen and now exists between United National,  
5      Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties  
6      under the Interstate and United National policies regarding the underlying *Tracy* action. United  
7      National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were  
8      required to defend Cirrus in connection with the *Tracy* action, and that United National had no  
9      obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United  
10     National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and  
11     Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and  
12     that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that  
13     Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in  
14     connection with the *Tracy* action. United National requests this Court to make and enter its  
15     binding judicial declarations in accordance with United National's contentions set forth in this  
16     paragraph. The requested declarations are both necessary and proper at this time under the  
17     circumstances in that the interest of judicial economy and substantial justice will be served  
18     thereby.

19

20                   SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

21       18.      United National incorporates by reference the allegations of paragraphs 1-15 of  
22      this counterclaim

23       19. An actual controversy has arisen and now exists between United National, Fireman's  
24      Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the  
25      Interstate and United National policies regarding the underlying *Tracy* action. United National  
26      contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to  
27      indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation  
28      to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is

1 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1  
2 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that  
3 United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that  
4 Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in  
5 connection with the *Tracy* action. United National requests this Court to make and enter its  
6 binding judicial declarations in accordance with United National's contentions set forth in this  
7 paragraph. The requested declarations are both necessary and proper at this time under the  
8 circumstances in that the interest of judicial economy and substantial justice will be served  
9 thereby.

10       20. If the Court enters a judicial declaration in accordance with United National's  
11 contentions set forth in the preceding paragraph, United National is entitled to recover from  
12 defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus  
13 prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National  
14 for its contribution toward the settlement of the *Tracy* action.

15  
16       WHEREFORE, United National prays for judgment as follows:

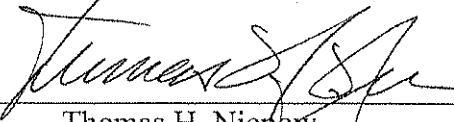
- 17       a. That the Court make and enter a binding judicial declaration of the parties'  
18           respective rights and duties in accordance with United National's contentions set  
19           forth in paragraph 17 above,  
20       b. That the Court make and enter a binding judicial declaration of the parties'  
21           respective rights and duties in accordance with United National's contentions set  
22           forth in paragraph 19 above,  
23       c. That the Court order and enter a money judgment requiring counterdefendants  
24           Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse  
25           United National \$100,000, plus prejudgment interest under Cal. Civ. Code  
26           §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy*  
27           action.  
28       d. That United National be awarded its costs of suit incurred herein; and

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1 e. For such other and further relief as the Court deems just and proper.  
2  
3

4 Respectfully submitted,  
5

6 NIELSEN, HALEY & ABBOTT LLP  
7

8 Dated: October 1, 2007 By:   
9

10 Thomas H. Niebow  
11

12 Attorneys for Defendant and Counterclaimant  
13 UNITED NATIONAL INSURANCE COMPANY  
14

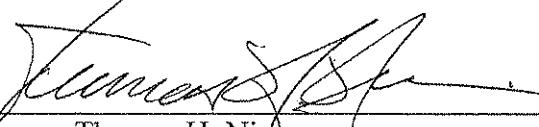
15 **DEMAND FOR JURY TRIAL**  
16

17 Defendant and counterclaimant United National Insurance Company demands trial by jury in  
18 this action.

19 Respectfully submitted,  
20

21 NIELSEN, HALEY & ABBOTT LLP  
22

23 Dated: October 1, 2007  
24

25 By:   
26 Thomas H. Niebow  
27 Attorneys for Defendant and Counterclaimant  
28 UNITED NATIONAL INSURANCE COMPANY  
29

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*Fireman's Fund Insurance Co. v. United National Ins. Co.*  
United State District Court, Northern District Court No.: C 07-04943 JL

1

**PROOF OF SERVICE**

2

I declare that:

3

I am a citizen of the United States, employed in the County of San Francisco. I am over  
the age of eighteen years, and not a party to the within cause. My business address is  
44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I  
served the following document(s) described as:

7

**ANSWER AND COUNTERCLAIM OF UNITED NATIONAL INSURANCE  
COMPANY.**

9

[ ] (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the  
fax number(s) set forth below, or as stated on the attached service list, on this date.

11

[ ] (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in  
the United States mail at San Francisco, California.

13

[ ] (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date  
to the offices of the addressee(s).

14

[ ] (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an  
overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it  
is to be served.

16

[ XX ] (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s)  
to be served on all parties listed on the service list on file with the court as of this date.

18

**Attorney for Plaintiff, Fireman's Fund Ins.  
Co.**

19

Christopher J. Borders

20

Casey A. Hatton

21

Hinshaw & Culbertson LLP

22

One California Street, 18th Floor

23

San Francisco, CA 94111

24

Tel: (415) 362-6000

25

Fax: (415) 834-9070

26

I declare under penalty of perjury that the foregoing is true and correct and that this  
declaration was executed on October 1 2007, at San Francisco, California.

27

*Fatima Puente*  
Fatima Puente

28

# **Exhibit 2**

JAN- 4-06 WED 3:03 PM RODEY LAW FIRM

FAX NO. 15057687395

P. I

ROSEAT, MARY JOHN  
KAREN Z. ADAMS  
BRUCE HALL  
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TODD L. ROMAY  
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MARIE C. RODEY (1859-1948)  
DON L. DICKASON (1866-1899)  
WILLIAM A. SLOAN (1870-1933)

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TELEPHONE (505) 984-2376  
FAX (505) 984-2947  
WKT:MM'S DIRECT NUMBER  
(505) 758-7323  
ETSBRK@RODEY.COM

January 4, 2006

Via Facsimile (800-506-5309) and U.S. Mail:

Cirrus Medical Staffing  
4651 Charlotte Park Drive, Suite 400  
Charlotte, NC 28217

Attention: Legal Department

Re: Tracy v. Lovelace Sandia Health System

Dear Legal Department Representative:

I represent Albuquerque Regional Medical Center and Lovelace Sandia Health System in a medical malpractice action brought by Ben Tracy as personal representative of the Estate of Marilyn Tracy. Your nurse, Cathy Robinson, was one of the nurses who cared for Mrs. Tracy prior to her death. I believe it is possible that opposing counsel, Pia Salazar, will be contacting you about how to accomplish service of process. She has expressed the intention to bring you into the case. Even if she decided not to do so, she will likely try to subpoena Ms. Robinson to give a deposition. I would appreciate the opportunity to visit prior to the deposition with whatever attorney you have represent her. I hope it is helpful to have prior notice of the possible suit or deposition. Please do not hesitate to call if you have any questions about the case.

Sincerely yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: *Ellen Thorne Skrak*  
Ellen Thorne Skrak  
ETS:br

IFC00453

JAN- 5-06 THU 12:13 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 1

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

COUNSELORS AND ATTORNEYS AT LAW

ALBUQUERQUE PLAZA  
201 THIRD STREET NW, SUITE 2200  
ALBUQUERQUE, NEW MEXICO 87102

P.O. BOX 1188  
ALBUQUERQUE, NEW MEXICO 87103

ELLEN THORNE SKRACK

TELEPHONE (505) 768-3200

Direct Number:  
768-7232

FACSIMILE (505) 753-7395

FACSIMILE TRANSMITTAL SHEET

TELECOPIER NUMBER: (505) 768-7395

DATE: January 5, 2006

TO: Greg Allen FAX No. (704) 887-0164

FROM: Ellen Thorne Skrak

OPERATOR: Barbara Rael

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE:

If you do not receive any of these pages, please call the operator at (505) 7667565

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Message: Tracy v. Lovelace Sandia Health System

Attached please find the Complaint filed in this matter.

JAN-5-06 THU 12:13 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 2

STATE OF NEW MEXICO  
SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO

BEN TRACY, as Personal Representative of  
the Estate of MARILYN TRACY, Deceased,

Plaintiff,

SUMMONS(ES) ISSUED

vs.

No.

CV-2005 07009

LOVELACE SANDIA HEALTH SERVICES, d/b/a  
ALBUQUERQUE REGIONAL MEDICAL CENTER,

Defendant.

COMPLAINT FOR WRONGFUL DEATH

For his Complaint, Ben Tracy, as Personal Representative of the Estate of Marilyn Tracy,  
states as follows:

1. Ben Tracy is the court-appointed Personal Representative of the Estate of Marilyn Tracy.
2. At all material times to this Complaint, Lovelace Sandia Health Services, d/b/a Albuquerque Regional Medical Center, hereinafter "ARMC", upon information and belief, was and is a general/acute care hospital open to the public located, and having its principle place of business, in Albuquerque, Bernalillo County, New Mexico.
3. At all material times to this Complaint, the nurses, respiratory therapists, and other healthcare providers who cared for Marilyn Tracy were employees, agents, and/or apparent agents of ARMC, acting within the course and scope of their employment.
4. Upon information and belief, C. Robinson, RN, L. Fellion (or Tellion), RN, and M.M. Graff, RT, are employees of ARMC, who were acting within the scope and course of their

JAN- 5-06 THU 12:14 PM RODEY LAW FIRM

FAX NO. 15057687395

P. 3

employment at all material times.

5. For the care complained of herein, Marilyn Tracy was a patient of ARMC at all relevant times.
6. While a patient of ARMC, the nursing staff, respiratory therapists, and/or other healthcare providers negligently failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's status was not improving. In addition, the nurses negligently failed to continue to monitor Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become unresponsive, apneic, go into asystole and code.
7. On October 2, 2004, Marilyn Tracy was admitted to ARMC.
8. On October 5, 2004, Marilyn Tracy was taken to surgery for an exploratory laparotomy and lysis of adhesions. The surgery was successful and at 8:00 p.m. that evening, Marilyn Tracy was discharged from the PACU and was back on the regular floor.
9. On October 6, 2004, Marilyn Tracy was noted to have an elevated pulse rate, a low blood pressure, and an increased oxygen requirement of 4-5 liters throughout the morning.
10. At 1:30 p.m., James Williams, MD, came in to evaluate Marilyn Tracy and noted that she had a low urine output and an increased creatinine level. Dr. Williams appropriately ordered a fluid bolus of 500 cc's to adjust her fluid status.
11. Later, at 4:00 p.m., Marilyn Tracy's pulse was 102, her blood pressure was 112/51, and her oxygen saturations were 91% on 3 liters of oxygen.

JAN- 5-06 THU 12:15 PM RODEY LAW FIRM

FAX NO. 15057687395

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12. At 5:15 p.m., Dr. Williams appropriately ordered a second fluid bolus of 500 cc's to be given over two hours to adjust Marilyn Tracy's fluid status.
13. Despite Dr. William's concerns about Marilyn Tracy's fluid status, the nurses negligently failed to record Marilyn Tracy's intake and output after 5:00 p.m. on October 6, 2004.
14. No vital signs were taken of Marilyn Tracy between 5:00 p.m. and 8:00 p.m. At 8:00 p.m., Marilyn Tracy's pulse was tachycardic at 130, her blood pressure was low at 90/54, and she required 3 liters of oxygen to maintain her saturations at 95 percent. The nurses negligently failed to inform Dr. Williams of the fact that Marilyn Tracy's vital signs were not improving. The nurses also negligently failed to record Marilyn Tracy's fluid status.
15. At 9:55 p.m., respiratory therapy notes that Marilyn Tracy's oxygen saturations are 68% on room air, and she required 3.5 liters of oxygen to get her saturations back up to 87%. The nurses and/or respiratory therapist failed to inform Dr. Williams of Marilyn Tracy's concerning oxygen saturation status.
16. On October 7, 2004, at 12:00 Midnight, Marilyn Tracy had a pulse of 96, a blood pressure of 88/62, and oxygen saturations of 92% on 3 liters of oxygen. These are the last recorded vital signs the nurses performed on Marilyn Tracy. The nurses' failure to notify Dr. Williams and perform more frequent vital signs, given Marilyn Tracy's condition, was a departure from the standard of care.
17. On October 7, 2004, at 5:20 a.m., Marilyn Tracy was found apneic and in asystole. A code was instituted but was unsuccessful. Marilyn Tracy was pronounced dead at 5:54 a.m.
18. Defendant ARMC acting through its employees, agents and/or apparent agents or

JAN- 5-06 THU 12:15 PM RODEY LAW FIRM

FAX NO. 15057687395

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contractors negligently failed to monitor Marilyn Tracy's fluid status, vital signs and oxygen saturation. As a result, Marilyn Tracy was allowed to deteriorate and become unresponsive.

19. Defendant ARMC, acting through its employees, agents and/or apparent agents or contractors of ARMC, including, but not limited to, Nurse C. Robinson and L. Fellion (or Tellion), RN and M.M. Graff, RT, negligently failed to inform the physician on call of Marilyn Tracy's status.
20. As a direct and proximate result of ARMC's negligence, and its employees', agents', apparent agents' and/or contractors' negligence, Marilyn Tracy was allowed to deteriorate, become unresponsive and die on October 7, 2004.
21. ARMC, acting through its employees, agents, apparent agents, or contractors, failed to exercise ordinary care and failed to possess and apply the knowledge and to use the skill and care ordinarily used by reasonably well-qualified hospital and hospital related businesses operating under similar circumstances, giving due consideration to the locality involved. Such acts or omissions include, but are not necessarily limited to, negligent hiring, staffing, training, supervision, evaluating, monitoring and retention of healthcare employees, and contractors on the hospital staff.
22. As a direct and proximate result of ARMC's negligence, and its employees', agents', apparent agents', and/or contractors' negligence, Marilyn Tracy became unresponsive, apneic, had asystole, coded and died.

WHEREFORE, Ben Tracy, as Personal Representative of the Estate of Marilyn Tracy, requests compensatory damages in an amount to be determined at trial, for the interest including



## GENERAL LIABILITY NOTICE OF OCCURRENCE/CLAIM

AGENCY	PHONE (A/C No. Ext.)	704-865-8584	DATE (MM/DD/YYYY)
Watson Insurance Agency, Inc.		OP ID CP 01/05/2006	
245 E. Second Avenue		PREVIOUSLY REPORTED	
P. O. Box 879		YES X NO	
Gastonia NC 28053			
Robert P. Watson - Trans Accts			
FAX 704-866-9886 EMAIL ADDRESS			
(A/C No.)			
CODE	SUB CODE		
AGENCY	CUSTOMER ID		
CIRR-U-1			
CONTACT			
CONTACT INSURED			

## INSURED

NAME AND ADDRESS	SOC SEC # OR FEIN:	NAME AND ADDRESS	WHERE TO CONTACT
Cirrus Medical Staffing, LLC 4651 Charlotte Pk Dr., Ste 400 Charlotte NC 28217		Greg Allen	
RESIDENCE PHONE (A/C, No.)	BUSINESS PHONE (A/C, No. Ext.)	RESIDENCE PHONE (A/C, No.)	BUSINESS PHONE (A/C, No. Ext.)
800 299-8132			

## OCCURRENCE

LOCATION OF OCCURRENCE (include city & state)	AUTHORITY CONTACTED
DESCRIPTION OF OCCURRENCE (Use separate sheet if necessary)	See attached letter received by insured regarding medical malpractice issue.---Please note that umbrella & GL coverage written thru Interstate Fire also.

## POLICY INFORMATION

COVERAGE PART OR FORMS (Insert form #s and edition dates)	PROD/COMP OP AGG	PERS & ADV INJ	EACH OCCURRENCE	FIRE DAMAGE	MEDICAL EXPENSE	DEDUCTIBLE	PD EI SND BDO
GENERAL AGGREGATE							
UMBRELLA/EXCESS	X UMBRELLA	EXCESS	CARRIER: Interstate XSP-1100100	LIMITS:	AGGR	PER CLAIM/ACC.	

## TYPE OF LIABILITY

PREMISES: INSURED IS	OWNER	TENANT	OTHER	TYPE OF PREMISES
OWNER'S NAME & ADDRESS (If not insured)				OWNER'S PHONE (A/C, No. Ext.)
PRODUCTS: INSURED IS	MANUFACTURER	VENDOR	OTHER	TYPE OF PRODUCT
MANUFACTURER'S NAME & ADDRESS (If not insured)				MANUFACT PHONE (A/C, No. Ext.)

## WHERE CAN PRODUCT BE SEEN?

OTHER LIABILITY INCLUDING COMPLETED OPERATIONS (Explain) GL written thru Interstate Fire--GL11120439

## INJURED/PROPERTY DAMAGED

NAME & ADDRESS (Injured/Owner)	Marilyn Tracy action brought by Ben Tracy		PHONE (A/C, No. Ext.)	
AGE	SEX	OCCUPATION	EMPLOYER'S NAME & ADDRESS	PHONE (A/C, No. Ext.)
DESCRIBE INJURY See attached			WHERE TAKEN	WHAT WAS INJURED DOING?
FATALITY			ESTIMATE AMOUNT	WHERE CAN PROPERTY BE SEEN?
DESCRIBE PROPERTY (Type, model, etc.)				WHEN CAN PROPERTY BE SEEN?

## WITNESSES

NAME & ADDRESS	BUSINESS PHONE (A/C, No. Ext.)	RESIDENCE PHONE (A/C, No.)

## REMARKS

REPORTED BY email/Greg Allen	REPORTED TO Rob Watson	SIGNATURE OF INSURED	SIGNATURE OF PRODUCER
NOTE: IMPORTANT STATE INFORMATION ON REVERSE SIDE © ACORD CORPORATION 1986			

LS

PA

NM

55406001460

"Terry Bellotti"  
<tbellotti@hciousa.com>  
01/06/2006 01:20 PM

To "Interstate - Claims - Sheila Robertson" <newloss@ffic.com>  
cc  
bcc  
Subject Cirrus Medical Staffing, Llc, Pol# ASC1000204

Jody

206/218

Sheila,  
Please see attached notice of claim and letter from a lawyer office. Contact  
Greg Allen if you have any question.

Terry Bellotti  
Health Care Insurers, a division of Risk Placement Services, Inc.  
3030 N. Rocky Point Dr. W., Suite 161  
Tampa, FL 33607  
(813) 287-6308  
(719) 528-8323 FAX  
tbellotti@hciousa.com

Please visit our web site [www.hciousa.com](http://www.hciousa.com)

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# **Exhibit 3**

JAN-10-06 TUE 11:42 AM RODEY LAW FIRM

FAX NO. 15057687395

P. 1

## RODEY, DICKASON, SLOAN, AKIN &amp; ROBB, P.A.

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ELLEN THORNE SKRACK

Direct Number:  
768-7232

## FACSIMILE TRANSMITTAL SHEET

TELECOPIER NUMBER: (505) 768-7395

DATE: January 10, 2006

TO: Jennifer Beran FAX No. (312) 346-3567

FROM: Ellen Thorne Skrak

OPERATOR: Barbara Rae!

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE:

6

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Message: Ben Tracy, Estate of Marilyn Tracy v. Lovelace Sandia, et al.

Attached please find the Complaint filed in the Marilyn Tracy matter.

JAN-10-06 TUE 11:45 AM RODEY LAW FIRM

FAX NO. 15057687395

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pre-judgment interest, costs, and for such other and further relief as this Court may deem just and appropriate.

Pia Salazar & Patrick W. Sullivan



PIA SALAZAR  
Attorneys for Plaintiff  
6301 Indian School Rd., NE, Ste. 300  
Albuquerque, NM 87110  
(505) 314-1414  
(505) 314-1419

# **Exhibit 4**

# NIELSEN, HALEY & ABBOTT LLP

LAWYERS

MARY N. ABBOTT  
 HILLARY C. AGNST  
 JENNIFER S. COHN  
 STEPHEN W. CUSICK  
 PETER C. HALEY  
 AUGUST L. LOHUARU  
 JAMES C. NIELSEN \*  
 THOMAS H. NIENOW  
\* Certified Specialist, Appellate Law  
 State Bar of California Board of Legal Specialization  
 \* Also admitted in Nevada

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 (415) 693-0900

*LOS ANGELES OFFICE*  
 523 WEST SIXTH STREET  
 SUITE 635  
 LOS ANGELES, CA 90014  
 FAX (213) 239-9007  
 TEL (213) 239-9009

May 4, 2008

WRITER'S DIRECT DIAL  
 (415) 248-0164  
 tnienow@nielsenhaley.com

Casey A. Hatton, Esq.  
 Hinshaw & Culbertson LLP  
 One California Street  
 18th Floor  
 San Francisco, CA 94111

*By Facsimile and U.S. Mail*

Re: *Interstate Fire & Casualty Co. v. United National Ins. Co.*  
 U.S.D.C., N.D. Cal., Action No. CV 07-04943 JL  
Our file: 3701-448

Dear Ms. Hatton:

Your April 30, 2008, letter omits topics we discussed and doesn't accurately reflect what I said.

Of immediate concern, this will clarify that I will provide you, on an informal basis, the nonprivileged portions of United National's claim file for the *Tracy* action, as well as a privilege log. I am hoping to be able to provide these documents to you by May 9, and will let you know if it becomes unfeasible. I also wish to confirm that your client's obligations under the applicable rules and law to respond to United National's discovery requests have not been altered or waived in any way.

Having now had a chance to review the documents you recently produced, I also want to let you know that United National intends to rely upon these documents (many of which were not previously provided to United National) in connection with the cross-motions for summary judgment, including but not limited to the following documents:

- Complaint in the action styled *Tracy v. Lovelace Sandia Health Services etc.*, State of New Mexico, Second Judicial District, County of Bernalillo, No. CV 2005 07009, Bates Nos. IFC00454-IFC00458.

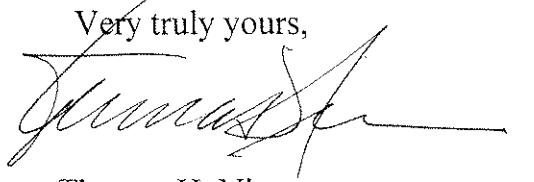
Casey A. Hatton, Esq.  
May 4, 2008  
Page 2

- Letter from Ellen Thorne Skrak to Cirrus Medical Staffing dated 1/4/06, Bates No. IFC00452.
- Accord "General Liability Notice of Occurrence/Claim" dated 1/5/06, Bates No. IFC00459.
- Facsimile from Ellen Thorne Skrak to Greg Allen dated 1/6/06, Bates No. IFC00452 and IFC00454-00458.
- E-mail from Terry Bellotti to Sheila Robertson of Interstate dated 1/6/06, Bates No. IFC00450.
- Facsimile from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No. IFC00451.
- Letter from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No. IFC00475.
- E-mail from Jennifer Beran to Ellen Thorne Skrak dated 1/10/06, Bates No. IFC00447.

In this regard, enclosed please find United National's supplemental disclosures under Fed.R.Civ.P., Rule 26(e)(1)(A). Additionally, you did not provide any log or similar documentation to substantiate the information and documents redacted from your recent production. When this information is eventually provided to us it may affect the available documents and, thus, the facts and chronology relevant to the cross-motions.

I look forward to receiving the proposed joint statement of facts.

Very truly yours,



Thomas H. Nienow

Enclosure

THN:ms

1 JAMES C. NIELSEN (111889)  
2 *jnielsen@nielsenhaley.com*  
3 THOMAS H. NIENOW (136454)  
4 *tienow@nielsenhaley.com*  
5 NIELSEN, HALEY & ABBOTT LLP  
6 44 Montgomery Street, Suite 750  
7 San Francisco, California 94104  
8 Telephone: (415) 693-0900  
9 Facsimile: (415) 693-9674

10 Attorneys for Defendant and Counterclaimant  
11 UNITED NATIONAL INSURANCE COMPANY

12  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO/OAKLAND DIVISION

INTERSTATE FIRE & CASUALTY  
COMPANY,

Action No.: C 07-04943 JL

DEFENDANT AND COUNTERCLAIMANT  
UNITED NATIONAL'S SUPPLEMENTAL  
DISCLOSURES, F.R.C.P. 26(e)(1)(A).

Plaintiff,

v.

UNITED NATIONAL INSURANCE  
COMPANY and DOES 1 through 10.

Defendants.

UNITED NATIONAL INSURANCE  
COMPANY,

Counterclaimant,

v.

INTERSTATE FIRE & CASUALTY  
COMPANY and Roes 1 through 10,

Counterdefendants.

Defendant and Counterclaimant United National Insurance Company discloses the following additional information under Fed.R.Civ.P. 26(e)(1)(A):

## **PRELIMINARY STATEMENT**

The following disclosures are based upon information, legal analysis, and documents that are currently known and available to United National after a reasonable inquiry and diligent search. United National has not completed its investigation, discovery or trial preparation in this matter. Further investigation, discovery, or legal analysis may disclose additional facts or documents that are currently unknown to United National, or may alter the relevance, discoverability or admissibility of facts and documents currently known to United National. United National, therefore, reserves the right to supplement this response and to introduce into evidence facts, contentions, or documents of which United National is currently unaware or of which the relevance, discoverability or admissibility is disclosed through further investigation, discovery, or legal analysis. Additionally, United National reserves the right to object, on any basis, to the introduction of the disclosures herein as evidence in this or any other matter. United National reserves the right to supplement or amend this disclosure up to the time of trial.

The disclosures provided herein are solely for the purpose of this action and no incidental or implied admissions of fact or liability are intended or should be inferred. The fact that United National has disclosed information or documents is not intended and shall not be construed as a waiver of any basis upon which United National may object to the introduction of the information or documents, including, but not limited to, the attorney-client privilege and the attorney-work-product doctrine.

## DISCLOSURES

### 1. Witness information.

United National hereby discloses the following additional names and, if known, the addresses and telephone numbers, of individuals likely to have discoverable information

1 that United National may use to support its claims or defenses, unless solely for  
2 impeachment, identifying the subjects of the information:

3           Witness:           Person Most Knowledgeable  
4                                   Watson Insurance Agency, Inc.  
5                                   P.O. Box 879  
6                                   Gastonia, NC 28053

7           Information:       Allegations of and facts concerning the underlying litigation  
8                                   styled *Tracy v. Cirrus Medical Staffing et al.*, State of New  
9                                   Mexico, Second Judicial District Court, County of Bernalillo,  
10                                  action number CV 2005 07009, the settlement of the *Tracy*  
11                                  action, notice to Interstate Fire & Casualty Company of the  
12                                  *Tracy* action, any proceedings related to the *Tracy* action, or  
13                                  the facts and circumstances involved in or giving rise to the  
14                                  *Tracy* action or any related proceeding.

15           Witness:           Jennifer Beran AIC  
16                                   Interstate Fire & Casualty Company  
17                                   33 W. Monroe, 12th Floor  
18                                   Chicago, IL 60603  
19                                   (312) 629-2300

20           Information:       Allegations of and facts concerning the underlying litigation  
21                                   styled *Tracy v. Cirrus Medical Staffing et al.*, State of New  
22                                   Mexico, Second Judicial District Court, County of Bernalillo,  
23                                  action number CV 2005 07009, the settlement of the *Tracy*  
24                                  action, notice to Interstate Fire & Casualty Company of the  
25                                  *Tracy* action, any proceedings related to the *Tracy* action, or  
26                                  the facts and circumstances involved in or giving rise to the  
27                                  *Tracy* action or any related proceeding.

28           Witness:           Ellen Thorne Skrak or another attorney from  
29                                   Rodey, Dickason, Sloan, Akin & Robb, P.A.  
30                                   201 Third Street NW, Suite 2200  
31                                   Albuquerque, NM 87102  
32                                   (505) 765-5900

33           Information:       Allegations of and facts concerning the underlying litigation  
34                                   styled *Tracy v. Cirrus Medical Staffing et al.*, State of New  
35                                   Mexico, Second Judicial District Court, County of Bernalillo,

1 action number CV 2005 07009, the settlement of the *Tracy*  
2 action, notice to Interstate Fire & Casualty Company of the  
3 *Tracy* action, any proceedings related to the *Tracy* action, or  
4 the facts and circumstances involved in or giving rise to the  
5 *Tracy* action or any related proceeding.

6 **2. Documents.**

7 United National discloses the following descriptions of additional documents, data  
8 compilations, and tangible things that are in its possession, custody, or control, which  
9 United may use to support its claims or defenses, unless solely for impeachment:

- 10 • All documents disclosed by Interstate in this action and bearing Bates Nos.  
11 IFC00001-IFC01265, including but not limited to the following documents  
12 specifically identified by Bates No. below:
  - 13 • Complaint in the action styled *Tracy v. Lovelace Sandia Health Services etc.*, State  
14 of New Mexico, Second Judicial District, County of Bernalillo, No. CV 2005  
15 07009, Bates Nos. IFC00454-IFC00458.
  - 16 • Letter from Ellen Thorne Skrak to Cirrus Medical Staffing dated 1/4/06, Bates No.  
17 IFC00452.
  - 18 • Accord "General Liability Notice of Occurrence/Claim" dated 1/5/06, Bates No.  
19 IFC00459.
  - 20 • Facsimile from Ellen Thorne Skrak to Greg Allen dated 1/6/06, Bates No.  
21 IFC00452 and IFC00454-00458.
  - 22 • E-mail from Terry Bellotti to Sheila Robertson of Interstate dated 1/6/06, Bates No.  
23 IFC00450.
  - 24 • Facsimile from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No.  
25 IFC00451.
  - 26 • Letter from Ellen Thorne Skrak to Jennifer Beran dated 1/10/06, Bates No.  
27 IFC00475.
  - 28 • E-mail from Jennifer Beran to Ellen Thorne Skrak dated 1/10/06, Bates No.

1 IFC00447.  
2  
3

3. **Itemization of Damages.**

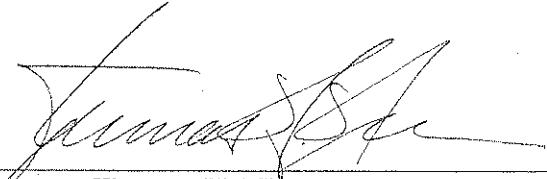
4 United National reiterates its estimate of its damages, as currently known and  
5 available:

6 \$100,000, plus prejudgment interest under Cal. Civ. Code §§3287(a) and 3289(b),  
7 for the money it contributed to settlement of the underlying *Tracy* action.

8  
9 United National notes that as to all matters set forth above, discovery is continuing.  
10

11 NIELSEN, HALEY & ABBOTT LLP

12  
13 Dated: May 2, 2008

14 By: 

15 Thomas H. Nienow  
16 Attorneys for Defendant and Counterclaimant  
17 UNITED NATIONAL INSURANCE COMPANY  
18  
19  
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27  
28

# **Exhibit 5**

NIELSEN, HALEY & ABBOTT LLP

LAWYERS

MARY N. ABBOTT

HILLARY C. AGNOST

JENNIFER S. COHN

STEPHEN W. CUSICK

PETER C. HALEY

AUGUST L. LOHUARU

DONALD L. MABRY

JAMES C. NIELSEN \* +

THOMAS H. NIENOW

\* Certified Specialist, Appellate Law  
State Bar of California Board of Legal Specialization  
+ Also admitted in Nevada

44 MONTGOMERY STREET

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June 2, 2008

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Casey A. Hatton, Esq.  
Hinshaw & Culbertson LLP  
One California Street  
18th Floor  
San Francisco, CA 94111

By Facsimile and U.S. Mail

Re: *Interstate Fire & Casualty Co. v. United National Ins. Co.*,  
U.S.D.C., N.D. Cal., Action No. CV 07-04943 JL  
Our file: 3701-448

Dear Ms. Hatton:

I recently sent you a supplemental disclosure of documents under Fed.R.Civ.P., Rule 26(f). The supplemental disclosure was necessitated by documents that your client produced to United National in this litigation for the first time.

Upon further consideration, I have determined that it is advisable for United National to amend its counterclaim as well. I have accordingly amended the counterclaim by adding new paragraphs 8-11 to it. The remainder of the answer and counterclaim is unchanged.

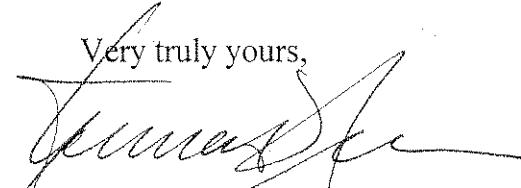
In order to facilitate filing of the amended answer and counterclaim, I have prepared and attach to this letter a stipulation allowing United National leave to file the amended answer and counterclaim pursuant to Fed.R.Civ.P., Rule 15(a)(2). I have attached a copy of the stipulation and the amended answer and counterclaim for your review.

If the stipulation and amended pleading are acceptable to you, will you please sign and return to me your signature on the stipulation at your earliest convenience? Of

Casey A. Hatton, Esq.  
June 2, 2008  
Page 2

course, if you would like to discuss this matter or any concerns that you may have concerning my proposal, please feel free to contact me. If we cannot agree upon a stipulation it appears that it will be necessary for United National to file a noticed motion, which I would like to avoid if possible.

Thank you for your attention to the above.

Very truly yours,  
  
Thomas H. Nienow

Enclosures

THN:ms

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10 Attorneys for Defendant and Counterclaimant  
11 UNITED NATIONAL INSURANCE COMPANY

12  
13 UNITED STATES DISTRICT COURT

14 NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO/OAKLAND DIVISION

16 FIREMAN'S FUND INSURANCE  
17 COMPANY,

18 Plaintiff,

19 v.

20 UNITED NATIONAL INSURANCE  
21 COMPANY and DOES 1 through 10.

22 Defendants.

23 UNITED NATIONAL INSURANCE  
24 COMPANY, a Pennsylvania corporation,

25 Cross-complainant,

26 v.

27 FIREMAN'S FUND INSURANCE  
28 COMPANY, a California corporation,  
INTERSTATE FIRE & CASUALTY  
COMPANY, an Illinois corporation, and  
Roes 1 through 10, inclusive,

Cross-defendants.

Action No.: C 07-04943 JL

STIPULATION FOR FILING OF UNITED  
NATIONAL'S AMENDED ANSWER AND  
COUNTERCLAIM; ORDER

Accompanying Document: Amended  
Answer and Counterclaim.

## STIPULATION

Defendant and counterclaimant United National Insurance Company and plaintiff and counterdefendant Interstate Fire & Casualty Company, through the signatures of their counsel below, hereby stipulate that United National may file the amended answer and counterclaim attached hereto as Exhibit 1 pursuant to Fed.R.Civ.P., Rule 15(a)(2), that the amended answer and counterclaim will be deemed filed on the date the Court signs an order permitting the filing of the amended answer and counterclaim, that Interstate waives notice and service of the amended answer and counterclaim, and that, pursuant to Fed.R.Civ.P., Rule 15(a)(3), Interstate shall have 10 days from the date the court's order is filed to answer or otherwise respond to the amended answer and counterclaim.

NIELSEN, HALEY & ABBOTT LLP

Dated: June 2, 2008

By:

Thomas H. Nienow

Attorneys for Defendant and Counterclaimant  
**UNITED NATIONAL INSURANCE COMPANY**

HINSHAW & CULBERTSON LLP

Dated: June , 2008

By:

Casey A. Hatton

Attorneys for Plaintiff and Counterdefendant  
INTERSTATE FIRE & CASUALTY COMPANY

1 ORDER  
2

3 The parties having executed the above stipulation, the Court, pursuant to  
4 Fed.R.Civ.P., Rule 15(a)(2), hereby orders that defendant and counterclaimant United  
5 National Insurance Company is given leave to file its amended answer and counterclaim  
6 attached hereto as Exhibit 1. It is further ordered that the amended answer and  
7 counterclaim shall be deemed filed on the date this order is filed, that notice and service  
8 shall not be required, and that Interstate shall have 10 days to answer or otherwise respond  
9 to the amended answer and counterclaim.  
10

11 Dated: June \_\_\_, 2008

12 Honorable Marilyn Hall Patel  
13 UNITED STATES DISTRICT JUDGE  
14  
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28

## EXHIBIT 1

1 JAMES C. NIELSEN (111889)  
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11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA

14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE  
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE  
COMPANY and DOES 1 through 10.

20 Defendants.

21 UNITED NATIONAL INSURANCE  
COMPANY, a Pennsylvania corporation,

22 Cross-complainant,

23 v.

24 FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,  
25 INTERSTATE FIRE & CASUALTY  
COMPANY, an Illinois corporation, and  
26 Roes 1 through 10, inclusive,

27  
28 Cross-defendants.

Action No.: C 07-04943 JL

AMENDED ANSWER AND  
COUNTERCLAIM OF UNITED NATIONAL  
INSURANCE COMPANY.

DEMAND FOR JURY TRIAL.

## ANSWER TO COMPLAINT

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the  
 2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of  
 3 liability, all of which speak for themselves. Except as so admitted and alleged, United National  
 4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
 5 every, and all of the allegations contained in paragraph 7 of the complaint.

6       8. Responding to the allegations in paragraph 8 of the complaint, United National is  
 7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
 8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
 9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
 10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
 11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
 12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the  
 13 complaint.

14       9. Responding to the allegations in paragraph 9 of the complaint, United National is  
 15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
 16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
 17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
 18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
 19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
 20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the  
 21 complaint.

22       10. Responding to the allegations in paragraph 10 of the complaint, United National is  
 23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*  
 24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of  
 25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005  
 26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United  
 27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1       11. Responding to the allegations in paragraph 11 of the complaint, United National is  
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty  
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and  
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the  
6 complaint.

7       12. Responding to the allegations in paragraph 12 of the complaint, United National  
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a  
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not  
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for  
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United  
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14       13. Responding to the allegations in paragraph 13 of the complaint, United National  
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17       14. Responding to the allegations in paragraph 14 of the complaint, United National  
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising  
19 that United National had determined that there was no coverage under the United National policy  
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a  
21 claim first made and reported during Interstate Fire & Casualty Company's immediately  
22 preceding policy period, and stating that United National continued to reserve all of its rights  
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,  
24 information or belief to respond to and on that basis denies each, every, and all of the allegations  
25 contained in paragraph 14 of the complaint.

26       15. Responding to the allegations contained in paragraph 15 of the complaint, United  
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1       16. Responding to the allegations in paragraph 16 of the complaint, United National  
2 admits and alleges that the United National policy includes, without the added italics, the policy  
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks  
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and  
5 all of the allegations contained in paragraph 16 of the complaint.

6       17. Responding to the allegations in paragraph 17 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8       18. Responding to the allegations in paragraph 18 of the complaint, United National  
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the  
12 complaint.

13       19. Responding to the allegations in paragraph 19 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
15 and all of the allegations contained in paragraph 19 of the complaint.

16       20. Responding to the allegations in paragraph 20 of the complaint, United National  
17 admits and alleges that the United National policy, which speaks for itself, includes the policy  
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph  
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National  
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22       21. Responding to the allegations in paragraph 21 of the complaint, United National  
23 admits and alleges that the United National policy, which speaks for itself, includes the policy  
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph  
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National  
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28       22. Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
2 alleged, Untied National denies each, every, and all of the allegations contained in paragraph 22  
3 of the complaint.

4 23. Responding to the allegations in paragraph 23 of the complaint, United National  
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6 24. Responding to the allegations in paragraph 24 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8 25. Responding to the allegations in paragraph 25 of the complaint, United National  
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
10 and all of the allegations contained in paragraph 25 of the complaint.

11 26. Responding to the allegations in paragraph 26 of the complaint, United National  
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.  
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or  
14 belief to respond and on that basis denies each, every, and all of the allegations contained in  
15 paragraph 26 of the complaint.

16 27. Responding to the allegations in paragraph 27 of the complaint, United National  
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
18 and all of the allegations contained in paragraph 27 of the complaint.

19 28. Responding to the allegations in paragraph 28 of the complaint, United National  
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21 29. Responding to the allegations in paragraph 29 of the complaint, United National  
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of  
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

each, every, and all of the allegations contained in paragraph 29 of the complaint.

30. Responding to the allegations in paragraph 30 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 30 of the complaint.

31. Responding to the allegations in paragraph 31 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 31 of the complaint.

32. Responding to the allegations in paragraph 32 of the complaint, United National admits and alleges that Fireman's Fund contends that United National had a duty to defend Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United National lacks sufficient knowledge, information or belief to respond to and on that basis denies each, every, and all of the allegations contained in paragraph 32 of the complaint.

1       33. Responding to the allegations in paragraph 33 of the complaint, United National  
 2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3       34. Responding to the allegations in paragraph 34 of the complaint, United National  
 4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
 5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
 6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
 7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
 8 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
 9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
 10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13       35. Responding to the allegations in paragraph 35 of the complaint, United National  
 14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
 15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
 16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
 17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
 18 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
 19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
 20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23       36. Responding to the allegations in paragraph 36 of the complaint, United National  
 24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
 25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
 26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
 27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
 28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

1 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
 2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5       37. Responding to the allegations in paragraph 37 of the complaint, United National  
 6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
 7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
 8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
 9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
 10 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
 11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
 12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15       38. Responding to the allegations in paragraph 38 of the complaint, United National  
 16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17       39. Responding to the allegations in paragraph 39 of the complaint, United National  
 18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
 19 and all of the allegations contained in paragraph 39 of the complaint.

20       40. Responding to the allegations in paragraph 40 of the complaint, United National  
 21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported  
 22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted  
 23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
 24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the  
 25 complaint.

26       41. Responding to the allegations in paragraph 41 of the complaint, United National  
 27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
 28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
2 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
3 immediately preceding policy period, and stating that United National continued to reserve all  
4 of its rights under the policy. Except as so admitted and alleged, United National lacks  
5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
6 and all of the allegations contained in paragraph 41 of the complaint.

7       42. Responding to the allegations in paragraph 42 of the complaint, United National  
8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9       43. Responding to the allegations in paragraph 43 of the complaint, United National  
10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11       44. Responding to the allegations in paragraph 44 of the complaint, United National  
12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13       45. Responding to the allegations in paragraph 45 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,  
15 every, and all of the allegations contained in paragraph 45 of the complaint.

16       46. Responding to the allegations contained in paragraph 46 of the complaint, United  
17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-  
18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as  
19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to  
20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph  
21 46 of the complaint.

22       47. Responding to the allegations in paragraph 47 of the complaint, United National  
23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
24 advising that United National had determined that there was no coverage under the Untied  
25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
26 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
27 immediately preceding policy period, and stating that United National continued to reserve all  
28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
2 and all of the allegations contained in paragraph 47 of the complaint.

3 48. Responding to the allegations in paragraph 48 of the complaint, United National  
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5 49. Responding to the allegations in paragraph 49 of the complaint, United National  
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7 50. Responding to the allegations in paragraph 50 of the complaint, United National  
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.  
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50  
11 of the complaint.

12 51. Responding to the allegations in paragraph 51 of the complaint, United National  
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14 52. Responding to the allegations in paragraph 52 of the complaint, United National  
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.  
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52  
18 of the complaint.

19 53. Responding to the allegations in paragraph 53 of the complaint, United National  
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
21 and all of the allegations contained in paragraph 53 of the complaint.

22 54. Responding to the allegations in paragraph 54 of the complaint, United National  
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
24 and all of the allegations contained in paragraph 54 of the complaint.

25 55. Responding to the allegations in paragraph 55 of the complaint, United National  
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising  
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United  
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1 alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that Untied  
2 National had determined that there was no coverage under the United National policy for the  
3 *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first  
4 made and reported during Interstate Fire & Casualty Company's immediately preceding policy  
5 period, and stating that United National continued to reserve all of its rights under the policy.  
6 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
7 respond and on that basis denies each, every, and all of the allegations contained in paragraph 55  
8 of the complaint.

9       56. Responding to the allegations in paragraph 56 of the complaint, United National  
10 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
11 and all of the allegations contained in paragraph 56 of the complaint.

12

13       United National further alleges the following affirmative defenses:

14       1. As and for a first, separate defense, United National alleges that the complaint and  
15 each claim therein do not state facts sufficient to constitute a cause of action against United  
16 National.

17       2. As and for a second, separate defense, United National alleges that the plaintiff  
18 lacks standing to bring this action.

19       3. As and for a third, separate defense, United National alleges that the complaint and  
20 each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
21 exclusions of the alleged United National policy. United National reserves the right to amend its  
22 answer to the Complaint to assert any additional defenses arising from the terms of the alleged  
23 United National insurance policy, and/or applicable insurance policy terms, provisions,  
24 conditions, limitations, and exclusions as may become apparent during the continuing course of  
25 discovery in this action.

26       4. As and for a fourth, separate defense, United National alleges that the complaint  
27 and each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
28 exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

1 number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period  
2 January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to  
3 the Complaint to assert any additional defenses arising from the terms of the alleged Interstate  
4 insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations,  
5 and exclusions as may become apparent during the continuing course of discovery in this action.  
6

7 Wherefore United National prays for judgment as follows:

- 8 1. That the Court deny plaintiff's prayers for judicial declarations set forth in the  
9 complaint;
- 10 2. That plaintiff take nothing by its complaint;
- 11 3. That United National be awarded its costs of suit incurred herein;
- 12 4. That United National be awarded its attorneys fees;
- 13 5. For such other and further relief as the Court deems just and proper.
- 14
- 15
- 16

17 COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,  
18 INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10

19 Counterclaimant United National Insurance Company, for its counterclaim against  
20 counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and  
21 Roes 1 through 10, inclusive, alleges as follows:  
22

23 GENERAL ALLEGATIONS

- 24 1. At all times herein mentioned, United National was and is a Pennsylvania  
corporation with its principal place of business in Bala Cynwyd, Pennsylvania.
- 25 2. United National is informed and believes and thereon alleges that  
counterdefendant Fireman's Fund Insurance Company is a California corporation with its  
26 principal place of business in Novato, California.  
27  
28

1       3.     United National is informed and believes and thereon alleges that  
 2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in  
 3 California, with its principal place of business in Chicago, Illinois.

4       4.     United National is unable to ascertain the true names and identities of those  
 5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of  
 6 Court to amend this complaint and all subsequent pleadings to insert the true names and  
 7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and  
 8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and  
 9 Interstate apply equally to Roes 1 through 10.

10      5.     Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §  
 11 1367(a).

12      6.     Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because  
 13 counterdefendant Fireman's Fund is a resident of this district.

14      7.     United National is informed and believes, and on that basis alleges, that Cirrus  
 15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*  
 16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New  
 17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.  
 18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a  
 19 medical-malpractice action that was filed on or about September 14, 2005.

20      8.     United National is informed and believes, and on that basis alleges, that the  
 21 complaint in the *Tracy* action alleges, at paragraph 6, that Cathy Robinson R.N., "negligently  
 22 failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital  
 23 signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's  
 24 status was not improving. In addition, the nurses negligently failed to continue to monitor  
 25 Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become  
 26 unresponsive, apneic, go into asystole and code." United National is informed and believes, and  
 27 on that basis alleges, that the complaint in the *Tracy* action alleges that Marilyn Tracy was  
 28 pronounced dead on October 7, 2004.

1       9.       United National is informed and believes, and on that basis alleges, that on  
 2 January 4, 2006, attorney Ellen Thorne Skark, counsel for defendant Lovelace Sandia in the  
 3 *Tracy* action, faxed a letter to Cirrus forwarding the *Tracy* complaint and stating that plaintiff's  
 4 counsel in the *Tracy* action "has expressed the intention to bring you into the case." United  
 5 National is informed and believes, and on that basis alleges, that Skark's letter also stated, "[y]our  
 6 nurse, Cathy Robinson, was one of the nurses who cared for Mrs. Tracy prior to her death."

7       10.      United National is informed and believes, and on that basis alleges, that Cirrus  
 8 notified Robert P. Watson of the Watson Insurance Agency, Inc., about Skrak's letter and the  
 9 *Tracy* complaint, and that Watson, on January 5, 2006, prepared a "General Liability Notice of  
 10 Occurrence/Claim" form listing Interstate policy number ASC1000204 and stating "See attached  
 11 letter received by insured regarding medical malpractice issue." United National is informed and  
 12 believes, and on that basis alleges, that Terry Bellotti of Health Care Insurers sent an e-mail to  
 13 Interstate on January 6, 2006, forwarding the form prepared by Watson, Skrak's letter, and the  
 14 *Tracy* complaint, and stating "please see attached notice of claim and letter from a lawyer office."

15       11.      United National is informed and believes, and on that basis alleges, that on  
 16 January 10, 2006, Skrak sent a fax to Jennifer Beran of Interstate forwarding a copy of Skrak's  
 17 January 4, 2006, letter to Cirrus and the complaint in the *Tracy* action.

18       12.      United National is informed and believes, and on that basis alleges, that the first-  
 19 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy  
 20 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death  
 21 was the subject of the *Tracy* action. United National is informed and believes, and on that basis  
 22 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting  
 23 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently  
 24 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according  
 25 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

26       13.      United National is informed and believes, and on that basis alleges, that N.M. Stat.  
 27 Ann. § 41-5-15 provides as follows:

1           A.     No malpractice action may be filed in any court against a qualifying health  
2           care provider before application is made to the medical review commission  
3           and its decision is rendered.

4

5           B     This application shall contain the following:

6

7               (1)    a brief statement of the facts of the case, naming the persons  
8           involved, the dates and the circumstances, so far as they are known,  
9           of the alleged act or acts of malpractice; and

10

11              (2)    a statement authorizing the panel to obtain access to all medical and  
12           hospital records and information pertaining to the matter giving rise  
13           to the application, and, for the purposes of is consideration of the  
14           matter only, waiving any claim of privilege as to the contents of  
15           those records. Nothing in that statement shall in any way be  
16           construed as waiving that privilege for any other purpose or in any  
17           other context, in or out of court.

18

19           14.    United National is informed and believes, and on that basis alleges, that N.M. Stat.  
20           Ann. § 41-5-16 provides as follows:

21

22           A.     Upon receipt of an application for review, the commission's director or his  
23           delegate shall cause to be served a true copy of the application on the  
24           health care providers involved. Service shall be effected pursuant to New  
25           Mexico law. If the health care provider involved chooses to retain legal  
26           counsel, his attorney shall informally enter his appearance with the  
27           director.

B The health care provider shall answer the application for review and in addition shall submit a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the matter giving rise to the application, and, for the purposes of its consideration of the matter only, waiving any claim of privilege as to the contents of those records. Nothing in that statement shall in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

C. In instances where applications are received employing the theory of respondeat superior or some other derivative theory of recovery, the director shall forward such applications to the state professional societies, associations or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed, and the health care provider named a respondent as employer, master or principal.

17        15.      United National is informed and believes, and on that basis alleges, that Interstate  
18 and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number  
19 ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United  
20 National is informed and believes, and on that basis alleges, that the Interstate policy generally  
21 provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of  
22 \$1,000,000 for each incident and \$3,000,000 in the aggregate.

23        16. United National is informed and believes, and on that basis alleges, that the  
24 Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

## I. COVERAGE.

The Company will pay on behalf of the Insured all sums which the  
**Insured** shall become legally obligated to pay as **Damages** for **Claims**  
first made against the Insured and reported to the Company during the

**Policy Period**, as a result of **Bodily Injury**, **Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

- A. on or after the policy effective date shown on the Declarations; or
  - B. at any time prior to the policy effective date shown on the Declarations if:
    - 1. such **incident** happens on or subsequent to the "prior acts date" on the Declarations, and
    - 2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage or Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

\* \* \*

## VI. WHEN CLAIM IS CONSIDERED AS FIRST MADE

A **Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

All **Claims** arising out of the same or related **incident** shall be considered as having been made at the item the first such **Claim** is made, and shall be

1 subject to the same limit of liability and only a single deductible, if any,  
 2 shall apply.

3 \* \* \*

4 IX. DEFINITIONS

5 When used in this policy (including endorsement forming a part hereof):

6  
 7 “**Bodily Injury**” means bodily injury, sickness or disease, mental anguish,  
 8 psychological injury or emotional distress sustained by any person,  
 9 including death at any time resulting therefrom;

10  
 11 “**Claim**” means a demand for money or the filing of **Suit** naming the  
 12 **Insured** and, in either case, alleging a **Bodily Injury**, **Property Damage**  
 13 or **Personal Injury** as a result of an **Incident**.

14 \* \* \*  
 15  
 16 “**Damages**” means compensatory judgments, settlement or awards but  
 17 does not include punitive or exemplary **Damages**, fines or penalties, the  
 18 return of fees or other consideration paid to the **insured**, or the portion of  
 19 any award or judgment caused by the multiplication of actual **Damages**  
 20 under federal or state law. However, if a **Suit** is brought against the  
 21 **Insured** with respect to a **Claim** for alleged acts or omissions falling  
 22 within the scope of coverage afforded by this insurance seeking both  
 23 compensatory and punitive or exemplary **Damages**, then the Company will  
 24 afford a defense to such action, without liability however, for payment of  
 such punitive or exemplary damages;

25 \* \* \*

26  
 27 “**Incident**” means any act or omission in the rendering of or failure to  
 28 render services by the **Insured**, or by any person for whom the **Insured** is  
 legally responsible, in the conduct of the business or professional

1 occupation specified in the Declarations.

2 Any such act or omission together with all related acts or omissions shall  
 3 be considered one “**Incident**” and be subject to the same limit of liability;

4 \* \* \*

5 “**Suit**” means a civil proceeding in which **Damages** because of **Bodily**  
 6 **Injury, Property Damage or Personal Injury** to which this insurance  
 7 applies are alleged. “**Suit**” includes:

- 8 A. an arbitration proceeding in which such **Damages** are claimed and  
 9 to which the **insured** must submit or does submit with the  
 10 Company’s consent; or
- 11 B. any other alternative dispute resolution proceeding in which such  
 12 **Damages** are claimed and to which the **Insured** submits with the  
 13 Company’s consent.

14 17. United National issued to Cirrus as named insured a claims-made-and-reported  
 15 professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with  
 16 policy number AH-0000267 (the “United National policy”)

17 18. The United National policy states as follows:

18 [From Form CPA-119(2.2005):]

## 19 SECTION I—PROFESSIONAL LIABILITY COVERAGE

### 20 1. Insuring Agreement

21 We will pay those sums that the insured becomes legally obligated to pay  
 22 as “compensatory damages” as a result of a “wrongful act.” This insurance  
 23 applies to injury only if a “claim” for damages to which no other insurance  
 24 applies, because of the injury is first made against the insured and reported  
 25 to us during the “policy period.” This insurance does not apply to injury  
 26 caused by a “wrongful act” that takes place outside of the “covered  
 27 territory” or was committed before the Retroactive Date shown in the  
 28 Declarations or after the “policy period.”

a. A "claim" by a person or organization seeking damages will be deemed to have been made when notice of such "claim" is received and recorded by the insured or by us, which ever comes first;

\* \* \*

- c. We will have the right and duty to select counsel and to defend any "suit" seeking damages. However, we will have no duty to defend the insured against any "suit" seeking damages for injury to which this insurance does not apply

\* \* \*

## 2. Exclusions

This insurance does not apply to:

\* \* \*

s. Any "claim," "suit," or "wrongful act" that might result in a "claim" or "suit," of which any insured had knowledge or could have reasonably foreseen, at the signing date of the application for this insurance.

一〇

## SECTION V—PROFESSIONAL LIABILITY CONDITIONS

\* \* \*

#### 4. Other Insurance

If other valid and collectible insurance with any other insurer is available to the insured covering a "claim" also covered hereunder (except insurance purchased to apply in excess of the limit of liability hereunder), this insurance will be excess of, and not contribute with, such insurance. If the insured has other coverage with us covered a ":claim" also covered by this policy or coverage Part, the insured must elect which policy or Coverage Part will apply and we will be liable under the Coverage Part so elected and will not be liable under any other policy or Coverage Part.

\* \* \*

5. **Representations**

By accepting this policy, you agree:

- a. The statements in the Declarations and application, made part of this policy, are accurate and complete;
- b. Those statements are based upon representations you made to us;
- c. We have issued this policy in reliance upon your representations; and
- d. This policy embodies all of the agreements existing between you and us or any of our agents relating to this insurance.

\* \* \*

12 **SECTION VI—DEFINITIONS**

\* \* \*

- 14 3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
- 16 4. “Claim” means a written demand upon the insured for “compensatory damages,” including, but not limited to, the service of “suit” or institution of arbitration proceedings against the insured. “Claim” includes reports of accidents, acts, errors, occurrences, offenses or omissions which may give rise to a “claim” under this policy. “Claims” based on or arising out of the same act or interrelated acts of one or more insured will be considered to be based on a single “wrongful act.”

\* \* \*

- 24 11. “Suit” means a civil proceeding in which damages for injury to which this insurance applies are alleged. “Suit” includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent.
- 28 12. “Wrongful act” means any act, error or omission in the furnishing of

1 professional social services. It includes the furnishing of food, beverages,  
2 medications or appliances in connection with those services. All  
3 “wrongful acts” committed in the furnishing of professional social services  
4 to any one person will be considered one “wrongful act.” All interrelated  
5 “wrongful acts” of one or more insured will be considered one “wrongful  
6 act.”

7

8 [From Form EPA-909 (5/2006):]

9 This endorsement modifies insurance provided under the following:

10 PROFESSIONAL LIABILITY COVERAGE PART

11 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the  
12 following:

13 12. “Wrongful act” means:

- 14 a. any act or omission in the furnishing of healthcare services  
15 to a patient or client including the furnishing of food,  
16 beverages, medications, medical treatment or appliances in  
17 connection with such services and the postmortem handling  
18 of human bodies.
- 19 b. All “wrongful acts” committed in the furnishing of services  
20 to any one patient or client will be considered one  
21 “wrongful act.” All interrelated “wrongful acts” of one or  
22 more insured will be considered one “wrongful act.”

23  
24 19. United National is informed and believes, and on that basis alleges, that Interstate  
25 and/or Fireman’s Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*  
26 pursuant to the terms and provisions of the Interstate policy.

27 FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

28 20. United National incorporates by reference the allegations of paragraphs 1-15 of

1 this counterclaim.

2       21. An actual controversy has arisen and now exists between United National,  
 3 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties  
 4 under the Interstate and United National policies regarding the underlying *Tracy* action. United  
 5 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were  
 6 required to defend Cirrus in connection with the *Tracy* action, and that United National had no  
 7 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United  
 8 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and  
 9 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and  
 10 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that  
 11 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in  
 12 connection with the *Tracy* action. United National requests this Court to make and enter its  
 13 binding judicial declarations in accordance with United National's contentions set forth in this  
 14 paragraph. The requested declarations are both necessary and proper at this time under the  
 15 circumstances in that the interest of judicial economy and substantial justice will be served  
 16 thereby.

17

#### SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

18       22. United National incorporates by reference the allegations of paragraphs 1-15 of  
 19 this counterclaim

20       23. An actual controversy has arisen and now exists between United National, Fireman's  
 21 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the  
 22 Interstate and United National policies regarding the underlying *Tracy* action. United National  
 23 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to  
 24 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation  
 25 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is  
 26 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1  
 27 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that

United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in connection with the *Tracy* action. United National requests this Court to make and enter its binding judicial declarations in accordance with United National's contentions set forth in this paragraph. The requested declarations are both necessary and proper at this time under the circumstances in that the interest of judicial economy and substantial justice will be served thereby.

If the Court enters a judicial declaration in accordance with United National's contentions set forth in the preceding paragraph, United National is entitled to recover from defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National for its contribution toward the settlement of the *Tracy* action.

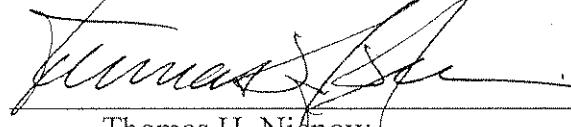
WHEREFORE, United National prays for judgment as follows:

- a. That the Court make and enter a binding judicial declaration of the parties' respective rights and duties in accordance with United National's contentions set forth in paragraph 17 above,
- b. That the Court make and enter a binding judicial declaration of the parties' respective rights and duties in accordance with United National's contentions set forth in paragraph 19 above,
- c. That the Court order and enter a money judgment requiring counterdefendants Fireman's Fund, Interstate, Roes 1 through 10, and any of them, to reimburse United National \$100,000, plus prejudgment interest under Cal. Civ. Code §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy* action.
- d. That United National be awarded its costs of suit incurred herein; and
- e. For such other and further relief as the Court deems just and proper.

1 Respectfully submitted,  
2  
3

NIELSEN, HALEY & ABBOTT LLP

4 Dated: June 2, 2008

By:   
5 Thomas H. Nienow  
6 Attorneys for Defendant and Counterclaimant  
7 UNITED NATIONAL INSURANCE COMPANY  
8  
9

10 **DEMAND FOR JURY TRIAL**

11 Defendant and counterclaimant United National Insurance Company demands trial by jury in  
12 this action.

13 Respectfully submitted,

14 NIELSEN, HALEY & ABBOTT LLP

15 Dated: June 2, 2008

16 By:   
17 Thomas H. Nienow  
18 Attorneys for Defendant and Counterclaimant  
19 UNITED NATIONAL INSURANCE COMPANY  
20  
21  
22  
23  
24  
25  
26  
27  
28

# Exhibit 6

**From:** Thomas Nienow  
**To:** Christopher J. Borders  
**Date:** 6/5/2008 4:42:39 PM  
**Subject:** Re: Interstate v. UNIC: Proposed Amended Counter claim; our file 3701-448

Chris:

Thank you for your comments. I looked again at the transmission dates on the various faxes your office produced and I have modified paragraphs 8-11 of the amended counterclaim accordingly. The updated amended answer and counterclaim is attached below. Paragraph 7 was not modified from the original counterclaim and is an accurate statement of facts that was not changed by the documents that your firm produced to us.

I've attached an updated stipulation below. Please return your signature to me by Monday June 9 if you agree that United National may file the amended pleading.

I will forward a proposed draft joint statement of facts to you shortly.

Tom

Tom Nienow  
(415) 248-0164

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>>> "Christopher J. Borders" <CBorders@hinshawlaw.com> 6/4/2008 9:46 AM >>>

Tom -

I received your June 2 fax with the proposed amended counterclaim. If you feel the need to include these other facts than Interstate will stipulate, provided you are open to making some corrections.

Paragraph 8 inserts the name of the insured's employee before you begin the quote, implying to me that the complaint so names her as responsible for the allegations you quote. As you will see, the underlying complaint allegation lumps all nurses, therapists and health care providers together without naming any specifically, and only refers to "C. Robinson" and not Cathy Robinson. I would ask that you revise this paragraph to state what the complaint states: that "C. Robinson" is listed in paragraph 4 as one of several nurses attending to the deceased, and that paragraph 6 alleges that "the nursing staff, respiratory therapists and/or other health care providers negligently failed [etc.]..."

Paragraph 10 states at line 14 that Mr. Bellotti's January 6 email included a copy of the underlying complaint. The email (IFC 00450) does not say this, and the complaint is not an attachment to Ms. Shrak's letter

that he did forward. A copy of the complaint in our file has a fax legend for January 5, and it appears that Greg Allen may have been sent a copy by Ms. Skrak on that day. But we do not see any record that Mr. Bellotti received a copy, and no record that Interstate received a copy before January 10. So I believe that the reference to the complaint in line 14 should be removed.

Paragraph 11 asserts that both a copy of the complaint and Ms. Skrak's letter was forwarded to Interstate on January 10. Again, the January 10 fax cover page (IFC 00451) only refers to the complaint. I do not see any document sending Ms. Beran a copy of Ms. Skrak's letter; it seems that only Mr. Bellotti's email included that letter. So I would ask that this paragraph be revised to remove the reference to Ms. Skrak's letter.

Also, since you are working on making your counterclaim more detailed and accurate, I also ask that paragraph 7 be revised. That paragraph states in the first sentence that Cirrus was a defendant in the underlying action and in the final sentence that the action was filed September 14, 2005, implying in my view that Cirrus was a defendant in 2005. I think that it would be more reasonable to revise this to state the accurate facts more clearly - that the action was filed in September 2005 not naming Cirrus or any Cirrus employee, and that Cirrus was added as a Doe defendant on March 21, 2006.

These issues overlap somewhat with the Joint Stipulation of Facts. We are happy to have these facts included in the stipulation if stated accurately and in chronological order. I would like to come to agreement on the Joint Stipulation this week given that we both need to determine what contested facts may need to be addressed in our summary judgment motions.

Please call or email with your thoughts. I will be in the office all week.

Chris

Christopher J. Borders  
Hinshaw & Culbertson LLP  
One California Street  
18th Floor  
San Francisco, CA 94111  
(415) 393-0124 (direct)  
(415) 362-6000 (main)  
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[cborders@hinshawlaw.com](mailto:cborders@hinshawlaw.com)

<p style="font-family: 'Times New Roman', Times, serif; font-size: 10pt;">

Hinshaw & Culbertson LLP is an Illinois registered limited liability partnership that has elected to be governed by the Illinois Uniform Partnership Act (1997).

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# Exhibit 7

1 JAMES C. NIELSEN (111889)  
2 *jnielsen@nielsenhaley.com*  
3 THOMAS H. NIENOW (136454)  
4 *tnienow@nielsenhaley.com*  
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8 Telephone: (415) 693-0900  
9 Facsimile: (415) 693-9674

10 Attorneys for Defendant and Counterclaimant  
11 UNITED NATIONAL INSURANCE COMPANY

12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO/OAKLAND DIVISION

15 FIREMAN'S FUND INSURANCE  
16 COMPANY,

17 Plaintiff,

18 v.

19 UNITED NATIONAL INSURANCE  
20 COMPANY and DOES 1 through 10.

21 Defendants.

22 UNITED NATIONAL INSURANCE  
23 COMPANY, a Pennsylvania corporation,

24 Cross-complainant,

25 v.

26 FIREMAN'S FUND INSURANCE  
27 COMPANY, a California corporation,  
INTERSTATE FIRE & CASUALTY  
COMPANY, an Illinois corporation, and  
Roes 1 through 10, inclusive,

28 Cross-defendants.

Action No.: C 07-04943 JL

AMENDED ANSWER AND  
COUNTERCLAIM OF UNITED NATIONAL  
INSURANCE COMPANY.

DEMAND FOR JURY TRIAL.

## **ANSWER TO COMPLAINT**

Defendant United National Insurance Company, in answer to the complaint filed by plaintiff Fireman's Fund Insurance Company, admits, denies, and alleges as follows:

1. Responding to the allegations in paragraph 1 of the complaint, United National admits and alleges that plaintiff makes the contentions set forth in paragraph 1 of the complaint. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 1 of the complaint.

2. Responding to the allegations in paragraph 2 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

3. Responding to the allegations in paragraph 3 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 3 of the complaint.

4. Responding to the allegations contained in paragraph 4 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 2 of the complaint.

5. Responding to the allegations in paragraph 5 of the complaint, United National admits and alleges that it is a Pennsylvania corporation and that it is authorized to and sells insurance policies on a surplus-lines basis in the State of California. Except as so admitted, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 5 of the complaint.

6. Responding to the allegations in paragraph 6 of the complaint, United National lacks sufficient knowledge, information or belief to respond and on that basis denies each, every, and all of the allegations contained in paragraph 6 of the complaint.

7. Responding to the allegations contained in paragraph 7 of the complaint, United National admits and alleges that it issued to named insured Cirrus Medical Staffing LLC, a policy of claims-made-and-reported professional liability insurance effective from January 27, 2006, to

1 January 26, 2007, with policy number AH-0000267 (the "United National policy") and that the  
2 United National policy sets forth to various terms, conditions, exclusions, and dollar limits of  
3 liability, all of which speak for themselves. Except as so admitted and alleged, United National  
4 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
5 every, and all of the allegations contained in paragraph 7 of the complaint.

6       8. Responding to the allegations in paragraph 8 of the complaint, United National is  
7 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
8 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
9 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
10 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
11 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
12 on that basis denies each, every, and all of the allegations contained in paragraph 8 of the  
13 complaint.

14       9. Responding to the allegations in paragraph 9 of the complaint, United National is  
15 informed and believes, and on that basis admits and alleges, that a lawsuit styled *Tracy v.*  
16 *Lovelace Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in  
17 the State of New Mexico, Second Judicial District Court, County of Bernalillo, action number  
18 CV 2005 07009, the documents and files of which speak for themselves. Except as so admitted  
19 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
20 on that basis denies each, every, and all of the allegations contained in paragraph 9 of the  
21 complaint.

22       10. Responding to the allegations in paragraph 10 of the complaint, United National is  
23 informed and believes and on that basis admits and alleges that a lawsuit styled *Tracy v. Lovelace*  
24 *Sandia Health Services dba Albuquerque Regional Medical Center et al.*, was filed in the State of  
25 New Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005  
26 07009, the documents of which speak for themselves. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 10 of the complaint.

1       11. Responding to the allegations in paragraph 11 of the complaint, United National is  
2 informed and believes, and on that basis admits and alleges, that Interstate Fire & Casualty  
3 Company defended Cirrus Medical Services LLC in the *Tracy* action. Except as so admitted and  
4 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
5 that basis denies each, every, and all of the allegations contained in paragraph 11 of the  
6 complaint.

7       12. Responding to the allegations in paragraph 12 of the complaint, United National  
8 admits and alleges that it received notice of the *Tracy* action and that United National issued a  
9 letter dated October 6, 2006, which speaks for itself, advising that United National would not  
10 defend Cirrus in the *Tracy* action, and reserving United National's rights to disclaim coverage for  
11 the *Tracy* action under the United National policy. Except as so admitted and alleged, United  
12 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
13 each, every, and all of the allegations contained in paragraph 12 of the complaint.

14       13. Responding to the allegations in paragraph 13 of the complaint, United National  
15 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
16 every, and all of the allegations contained in paragraph 13 of the complaint.

17       14. Responding to the allegations in paragraph 14 of the complaint, United National  
18 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself, advising  
19 that United National had determined that there was no coverage under the United National policy  
20 for the *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a  
21 claim first made and reported during Interstate Fire & Casualty Company's immediately  
22 preceding policy period, and stating that United National continued to reserve all of its rights  
23 under the policy. Except as so admitted and alleged, United National lacks sufficient knowledge,  
24 information or belief to respond to and on that basis denies each, every, and all of the allegations  
25 contained in paragraph 14 of the complaint.

26       15. Responding to the allegations contained in paragraph 15 of the complaint, United  
27 National lacks sufficient knowledge, information or belief to respond and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 15 of the complaint.

1       16. Responding to the allegations in paragraph 16 of the complaint, United National  
2 admits and alleges that the United National policy includes, without the added italics, the policy  
3 language quoted in paragraph 16. Except as so admitted and alleged, United National lacks  
4 sufficient knowledge, information or belief to respond to and on that basis denies each, every, and  
5 all of the allegations contained in paragraph 16 of the complaint.

6       17. Responding to the allegations in paragraph 17 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 17 of the complaint.

8       18. Responding to the allegations in paragraph 18 of the complaint, United National  
9 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
10 alleged, United National lacks sufficient knowledge, information or belief to respond to and on  
11 that basis denies each, every, and all of the allegations contained in paragraph 18 of the  
12 complaint.

13       19. Responding to the allegations in paragraph 19 of the complaint, United National  
14 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
15 and all of the allegations contained in paragraph 19 of the complaint.

16       20. Responding to the allegations in paragraph 20 of the complaint, United National  
17 admits and alleges that the United National policy, which speaks for itself, includes the policy  
18 language quoted in paragraph 20, although the quoted language is set forth in a larger paragraph  
19 that has been omitted from paragraph 20. Except as so admitted and alleged, United National  
20 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
21 every, and all of the allegations contained in paragraph 20 of the complaint.

22       21. Responding to the allegations in paragraph 21 of the complaint, United National  
23 admits and alleges that the United National policy, which speaks for itself, includes the policy  
24 language quoted in paragraph 21, although the quoted language is set forth in a larger paragraph  
25 that has been omitted from paragraph 21. Except as so admitted and alleged, United National  
26 lacks sufficient knowledge, information or belief to respond to and on that basis denies each,  
27 every, and all of the allegations contained in paragraph 21 of the complaint.

28       22. Responding to the allegations in paragraph 22 of the complaint, United National

1 admits and alleges that the United National policy speaks for itself. Except as so admitted and  
2 alleged, Untied National denies each, every, and all of the allegations contained in paragraph 22  
3 of the complaint.

4       23. Responding to the allegations in paragraph 23 of the complaint, United National  
5 denies each, every, and all of the allegations contained in paragraph 23 of the complaint.

6       24. Responding to the allegations in paragraph 24 of the complaint, United National  
7 denies each, every, and all of the allegations contained in paragraph 24 of the complaint.

8       25. Responding to the allegations in paragraph 25 of the complaint, United National  
9 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
10 and all of the allegations contained in paragraph 25 of the complaint.

11       26. Responding to the allegations in paragraph 26 of the complaint, United National  
12 admits and alleges that it contributed \$100,000 on behalf of Cirrus to settle the *Tracy* action.  
13 Except as so admitted and alleged, United National lacks sufficient knowledge, information or  
14 belief to respond and on that basis denies each, every, and all of the allegations contained in  
15 paragraph 26 of the complaint.

16       27. Responding to the allegations in paragraph 27 of the complaint, United National  
17 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
18 and all of the allegations contained in paragraph 27 of the complaint.

19       28. Responding to the allegations in paragraph 28 of the complaint, United National  
20 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

21       29. Responding to the allegations in paragraph 29 of the complaint, United National  
22 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
23 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
24 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
25 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
26 National contends that it has no obligation to reimburse Fireman's Fund of Interstate for any of  
27 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
28 National lacks sufficient knowledge, information or belief to respond to and on that basis denies

1 each, every, and all of the allegations contained in paragraph 29 of the complaint.

2       30. Responding to the allegations in paragraph 30 of the complaint, United National  
3 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
4 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
5 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
6 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
7 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
8 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
9 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
10 each, every, and all of the allegations contained in paragraph 30 of the complaint.

11       31. Responding to the allegations in paragraph 31 of the complaint, United National  
12 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
13 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
14 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
15 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
16 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
17 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
18 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
19 each, every, and all of the allegations contained in paragraph 31 of the complaint.

20       32. Responding to the allegations in paragraph 32 of the complaint, United National  
21 admits and alleges that Fireman's Fund contends that United National had a duty to defend  
22 Cirrus in the *Tracy* action, that Fireman's Fund contends that United National must reimburse  
23 Fireman's Fund for some or all of the costs to defend Cirrus in the *Tracy* action, that United  
24 National contends that it had no duty to defend Cirrus in the *Tracy* action, and that United  
25 National contends that it has no obligation to reimburse Fireman's Fund or Interstate for any of  
26 the costs to defend Cirrus in the *Tracy* action. Except as so admitted and alleged, United  
27 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
28 each, every, and all of the allegations contained in paragraph 32 of the complaint.

1       33. Responding to the allegations in paragraph 33 of the complaint, United National  
2 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

3       34. Responding to the allegations in paragraph 34 of the complaint, United National  
4 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
5 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
6 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
7 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
8 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
9 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
10 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
11 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
12 each, every, and all of the allegations contained in paragraph 34 of the complaint.

13       35. Responding to the allegations in paragraph 35 of the complaint, United National  
14 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
15 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
16 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
17 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
18 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
19 Fireman's Fund or Interstate for all or part of any payment by Fireman's' Fund or Interstate to  
20 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
21 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
22 each, every, and all of the allegations contained in paragraph 35 of the complaint.

23       36. Responding to the allegations in paragraph 36 of the complaint, United National  
24 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
25 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
26 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
27 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
28 the *Tracy* action, and that United National contends that it has no obligation to reimburse

1 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
 2 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 3 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 4 each, every, and all of the allegations contained in paragraph 36 of the complaint.

5       37. Responding to the allegations in paragraph 37 of the complaint, United National  
 6 admits and alleges that Fireman's Fund contends that United National had a duty to indemnify  
 7 Cirrus in connection with the *Tracy* action, that Fireman's Fund contends that United National  
 8 must reimburse Fireman's Fund for a share of the "indemnity expenses incurred in the defense  
 9 of the mutual Insured," that United National contends that it had no duty to indemnify Cirrus in  
 10 the *Tracy* action, and that United National contends that it has no obligation to reimburse  
 11 Fireman's Fund or Interstate for all or part of any payment by Fireman's Fund or Interstate to  
 12 indemnify cirrus in connection with the *Tracy* action. Except as so admitted and alleged, United  
 13 National lacks sufficient knowledge, information or belief to respond to and on that basis denies  
 14 each, every, and all of the allegations contained in paragraph 37 of the complaint.

15       38. Responding to the allegations in paragraph 38 of the complaint, United National  
 16 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

17       39. Responding to the allegations in paragraph 39 of the complaint, United National  
 18 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
 19 and all of the allegations contained in paragraph 39 of the complaint.

20       40. Responding to the allegations in paragraph 40 of the complaint, United National  
 21 admits and alleges that it issued to Cirrus as named insured a policy of claims-made-and-reported  
 22 professional liability insurance referenced in paragraph 7 of this answer. Except as so admitted  
 23 and alleged, United National lacks sufficient knowledge, information or belief to respond to and  
 24 on that basis denies each, every, and all of the allegations contained in paragraph 40 of the  
 25 complaint.

26       41. Responding to the allegations in paragraph 41 of the complaint, United National  
 27 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
 28 advising that United National had determined that there was no coverage under the Untied

1 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
 2 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
 3 immediately preceding policy period, and stating that United National continued to reserve all  
 4 of its rights under the policy. Except as so admitted and alleged, United National lacks  
 5 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
 6 and all of the allegations contained in paragraph 41 of the complaint.

7       42. Responding to the allegations in paragraph 42 of the complaint, United National  
 8 denies each, every, and all of the allegations contained in paragraph 42 of the complaint.

9       43. Responding to the allegations in paragraph 43 of the complaint, United National  
 10 denies each, every, and all of the allegations contained in paragraph 43 of the complaint.

11      44. Responding to the allegations in paragraph 44 of the complaint, United National  
 12 incorporates by reference paragraphs 1 through 27 of this answer as though fully set forth here.

13      45. Responding to the allegations in paragraph 45 of the complaint, United National  
 14 lacks sufficient knowledge, information or belief to respond and on that basis denies each,  
 15 every, and all of the allegations contained in paragraph 45 of the complaint.

16      46. Responding to the allegations contained in paragraph 46 of the complaint, United  
 17 National admits and alleges that it issued to Cirrus as named insured a policy of claims-made-  
 18 and-reported professional liability insurance referenced in paragraph 7 of this answer. Except as  
 19 so admitted and alleged, United National lacks sufficient knowledge, information or belief to  
 20 respond to and on that basis denies each, every, and all of the allegations contained in paragraph  
 21 46 of the complaint.

22      47. Responding to the allegations in paragraph 47 of the complaint, United National  
 23 admits and alleges that it issued a letter dated February 13, 2006, which speaks for itself,  
 24 advising that United National had determined that there was no coverage under the Untied  
 25 National policy for the *Tracy* action because, among other reasons, the *Tracy* action appeared to  
 26 constitute a claim first made and reported during Interstate Fire & Casualty Company's  
 27 immediately preceding policy period, and stating that United National continued to reserve all  
 28 of its rights under the policy. Except as so admitted and alleged, United National lacks

1 sufficient knowledge, information or belief to respond to and on that basis denies each, every,  
2 and all of the allegations contained in paragraph 47 of the complaint.

3       48. Responding to the allegations in paragraph 48 of the complaint, United National  
4 denies each, every, and all of the allegations contained in paragraph 48 of the complaint.

5       49. Responding to the allegations in paragraph 49 of the complaint, United National  
6 denies each, every, and all of the allegations contained in paragraph 49 of the complaint.

7       50. Responding to the allegations in paragraph 50 of the complaint, United National  
8 admits and alleges that plaintiff makes the contentions set forth in paragraph 50 of the complaint.  
9 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
10 respond and on that basis denies each, every, and all of the allegations contained in paragraph 50  
11 of the complaint.

12       51. Responding to the allegations in paragraph 51 of the complaint, United National  
13 incorporates by reference paragraphs 1 through 28 of this answer as though fully set forth here.

14       52. Responding to the allegations in paragraph 52 of the complaint, United National  
15 admits and alleges that plaintiff makes the contentions set forth in paragraph 52 of the complaint.  
16 Except as so admitted, United National lacks sufficient knowledge, information or belief to  
17 respond and on that basis denies each, every, and all of the allegations contained in paragraph 52  
18 of the complaint.

19       53. Responding to the allegations in paragraph 53 of the complaint, United National  
20 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
21 and all of the allegations contained in paragraph 53 of the complaint.

22       54. Responding to the allegations in paragraph 54 of the complaint, United National  
23 lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
24 and all of the allegations contained in paragraph 54 of the complaint.

25       55. Responding to the allegations in paragraph 55 of the complaint, United National  
26 admits and alleges that it issued a letter dated October 6, 2006, which speaks for itself, advising  
27 that United National would not defend Cirrus in the *Tracy* action, and reserving United  
28 National's rights to disclaim coverage for the *Tracy* action. United National further admits and

1       alleges that it issued a letter dated February 13, 2007, which speaks for itself, advising that United  
 2       National had determined that there was no coverage under the United National policy for the  
 3       *Tracy* action because, among other reasons, the *Tracy* action appeared to constitute a claim first  
 4       made and reported during Interstate Fire & Casualty Company's immediately preceding policy  
 5       period, and stating that United National continued to reserve all of its rights under the policy.  
 6       Except as so admitted, United National lacks sufficient knowledge, information or belief to  
 7       respond and on that basis denies each, every, and all of the allegations contained in paragraph 55  
 8       of the complaint.

9                 56.      Responding to the allegations in paragraph 56 of the complaint, United National  
 10       lacks sufficient knowledge, information or belief to respond and on that basis denies each, every,  
 11       and all of the allegations contained in paragraph 56 of the complaint.

12

13       United National further alleges the following affirmative defenses:

14       1.       As and for a first, separate defense, United National alleges that the complaint and  
 15       each claim therein do not state facts sufficient to constitute a cause of action against United  
 16       National.

17       2.       As and for a second, separate defense, United National alleges that the plaintiff  
 18       lacks standing to bring this action.

19       3.       As and for a third, separate defense, United National alleges that the complaint and  
 20       each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
 21       exclusions of the alleged United National policy. United National reserves the right to amend its  
 22       answer to the Complaint to assert any additional defenses arising from the terms of the alleged  
 23       United National insurance policy, and/or applicable insurance policy terms, provisions,  
 24       conditions, limitations, and exclusions as may become apparent during the continuing course of  
 25       discovery in this action.

26       4.       As and for a fourth, separate defense, United National alleges that the complaint  
 27       and each cause of action in it are barred by the terms, provisions, conditions, limitations, and  
 28       exclusions of a policy of liability insurance issued by Interstate Fire & Casualty Company, policy

number ASC-1000204, to named insured Cirrus Medical Staffing, LLC, for the policy period January 27, 2005, to January 27, 2006. United National reserves the right to amend its answer to the Complaint to assert any additional defenses arising from the terms of the alleged Interstate insurance policy, and/or applicable insurance policy terms, provisions, conditions, limitations, and exclusions as may become apparent during the continuing course of discovery in this action.

Wherefore United National prays for judgment as follows:

1. That the Court deny plaintiff's prayers for judicial declarations set forth in the complaint;
  2. That plaintiff take nothing by its complaint;
  3. That United National be awarded its costs of suit incurred herein;
  4. That United National be awarded its attorneys fees;
  3. For such other and further relief as the Court deems just and proper.

**COUNTERCLAIM AGAINST FIREMANS' FUND INSURANCE COMPANY,  
INTERSTATE FIRE & CASUALTY COMPANY, AND ROES 1 THROUGH 10**

Counterclaimant United National Insurance Company, for its counterclaim against counterdefendants Fireman's Fund Insurance Company, Interstate Fire & Casualty Company, and Roes 1 through 10, inclusive, alleges as follows:

## GENERAL ALLEGATIONS

1. At all times herein mentioned, United National was and is a Pennsylvania corporation with its principal place of business in Bala Cynwyd, Pennsylvania.
  2. United National is informed and believes and thereon alleges that counterdefendant Fireman's Fund Insurance Company is a California corporation with its principal place of business in Novato, California.

1           3.       United National is informed and believes and thereon alleges that  
 2 counterdefendant Interstate Fire & Casualty Company is an Illinois corporation, doing business in  
 3 California, with its principal place of business in Chicago, Illinois.

4           4.       United National is unable to ascertain the true names and identities of those  
 5 counterdefendants designated as Roes 1 through 10, inclusive. United National will ask leave of  
 6 Court to amend this complaint and all subsequent pleadings to insert the true names and  
 7 capacities of these fictitiously named counterdefendants when ascertained. The allegations and  
 8 controversies alleged below with respect to the named counterdefendants Fireman's Fund and  
 9 Interstate apply equally to Roes 1 through 10.

10          5.       Jurisdiction over United National's counterclaim is conferred by 28 U.S.C. §  
 11 1367(a).

12          6.       Venue is proper in this Court under 28 U.S.C. § 1391(a)(1), because  
 13 counterdefendant Fireman's Fund is a resident of this district.

14          7.       United National is informed and believes, and on that basis alleges, that Cirrus  
 15 Medical Staffing LLC was sued in underlying litigation styled *Tracy v. Lovelace Sandia Health*  
 16 *Services dba Albuquerque Regional Medical Center et al.*, which was filed in the State of New  
 17 Mexico, Second Judicial District Court, County of Bernalillo, action number CV 2005 07009.  
 18 United National is informed and believes, and on that basis alleges, that the *Tracy* action was a  
 19 medical-malpractice action that was filed on or about September 14, 2005.

20          8.       United National is informed and believes, and on that basis alleges, that the  
 21 complaint in the *Tracy* action alleges, at paragraph 6, that Cathy Robinson R.N., "negligently  
 22 failed to monitor Marilyn Tracy's fluid status, negligently failed to respond to worsening vital  
 23 signs and negligently failed to appropriately notify the physician on call that Marilyn Tracy's  
 24 status was not improving. In addition, the nurses negligently failed to continue to monitor  
 25 Marilyn Tracy, despite her worsening condition, such that she was allowed to deteriorate, become  
 26 unresponsive, apneic, go into asystole and code." United National is informed and believes, and  
 27 on that basis alleges, that the complaint in the *Tracy* action alleges that Marilyn Tracy was  
 28 pronounced dead on October 7, 2004.

1       9.     United National is informed and believes, and on that basis alleges, that on  
2 January 4, 2006, attorney Ellen Thorne Skrak, counsel for defendant Lovelace Sandia in the  
3 *Tracy* action, faxed a letter to Cirrus stating that plaintiff's counsel in the *Tracy* action "has  
4 expressed the intention to bring you into the case." United National is informed and believes, and  
5 on that basis alleges, that Skrak's letter also stated, "[y]our nurse, Cathy Robinson, was one of the  
6 nurses who cared for Mrs. Tracy prior to her death." United National is informed and believes,  
7 and on that basis alleges, that Skrak forwarded a copy of the complaint in the *Tracy* action to  
8 Greg Allen of Cirrus on January 5, 2006.

9       10.    United National is informed and believes, and on that basis alleges, that Cirrus  
10 notified Robert P. Watson of the Watson Insurance Agency, Inc., about Skrak's letter, and that  
11 Watson, on January 5, 2006, prepared a "General Liability Notice of Occurrence/Claim" form  
12 listing Interstate policy numberASC1000204, a notice-of-claim date of January 4, 2006, and  
13 stating "See attached letter received by insured regarding medical malpractice issue." United  
14 National is informed and believes, and on that basis alleges, that Terry Bellotti of Health Care  
15 Insurers sent an e-mail to Interstate on January 6, 2006, stating "please see attached notice of  
16 claim and letter from a lawyer office."

17       11.    United National is informed and believes, and on that basis alleges, that on  
18 January 10, 2006, Skrak sent a fax to Jennifer Beran of Interstate forwarding a copy of the  
19 complaint in the *Tracy* action.

20       12.    United National is informed and believes, and on that basis alleges, that the first-  
21 amended complaint in the *Tracy* action alleges, at paragraph 3, that Cirrus employee Cathy  
22 Robinson was a "healthcare provider[] who treated Marilyn Tracy," the decedent whose death  
23 was the subject of the *Tracy* action. United National is informed and believes, and on that basis  
24 alleges, that the first amended complaint further alleges, at paragraph 28, that Cirrus "acting  
25 through its employee, agent and/or apparent agent or contractor, Cathy Robinson, RN, negligently  
26 failed to inform the physician on call of Marilyn Tracy's status," as a result of which, according  
27 to paragraph 23, Marilyn Tracy was pronounced dead on October 7, 2004.

28       13.    United National is informed and believes, and on that basis alleges, that N.M. Stat.

1 Ann. § 41-5-15 provides as follows:

2  
3 A. No malpractice action may be filed in any court against a qualifying health  
4 care provider before application is made to the medical review commission  
5 and its decision is rendered.

6

7 B This application shall contain the following:

8

9 (1) a brief statement of the facts of the case, naming the persons  
10 involved, the dates and the circumstances, so far as they are known,  
11 of the alleged act or acts of malpractice; and

12

13 (2) a statement authorizing the panel to obtain access to all medical and  
14 hospital records and information pertaining to the matter giving rise  
15 to the application, and, for the purposes of is consideration of the  
16 matter only, waiving any claim of privilege as to the contents of  
17 those records. Nothing in that statement shall in any way be  
18 construed as waiving that privilege for any other purpose or in any  
19 other context, in or out of court.

20

21 14. United National is informed and believes, and on that basis alleges, that N.M. Stat.

22 Ann. § 41-5-16 provides as follows:

23

24 A. Upon receipt of an application for review, the commission's director or his  
25 delegate shall cause to be served a true copy of the application on the  
26 health care providers involved. Service shall be effected pursuant to New  
27 Mexico law. If the health care provider involved chooses to retain legal  
28 counsel, his attorney shall informally enter his appearance with the

1 director.

2  
3       B      The health care provider shall answer the application for review and in  
4                  addition shall submit a statement authorizing the panel to obtain access to  
5                  all medical and hospital records and information pertaining to the matter  
6                  giving rise to the application, and, for the purposes of its consideration of  
7                  the matter only, waiving any claim of privilege as to the contents of those  
8                  records. Nothing in that statement shall in any way be construed as  
9                  waiving that privilege for any other purpose or in any other context, in or  
10                 out of court.

11  
12       C.     In instances where applications are received employing the theory of  
13                  respondeat superior or some other derivative theory of recovery, the  
14                  director shall forward such applications to the state professional societies,  
15                  associations or licensing boards of both the individual health care provider  
16                  whose alleged malpractice caused the application to be filed, and the health  
17                  care provider named a respondent as employer, master or principal.

18  
19       15.     United National is informed and believes, and on that basis alleges, that Interstate  
20                  and Roes 1 through 10 issued to Cirrus as named insured a policy of liability insurance, number  
21                  ASC-10000204, effective for the policy period January 27, 2005, to January 27, 2006. United  
22                  National is informed and believes, and on that basis alleges, that the Interstate policy generally  
23                  provides liability coverage to Cirrus on a claims-made-and-reported basis subject to limits of  
24                  \$1,000,000 for each incident and \$3,000,000 in the aggregate.

25       16.     United National is informed and believes, and on that basis alleges, that the  
26                  Interstate policy sets forth the following language in Form 01-PL-4002 (03/04):

27       I.       COVERAGE.

28                  The Company will pay on behalf of the Insured all sums which the

**Insured** shall become legally obligated to pay as **Damages** for **Claims** first made against the Insured and reported to the Company during the **Policy Period**, as a result of **Bodily Injury**, **Property Damages** or **Personal Injury** caused by an **incident**, provided always that such **incident** happens:

- A. on or after the policy effective date shown on the Declarations; or
  - B. at any time prior to the policy effective date shown on the Declarations if;
    - 1. such **incident** happens on or subsequent to the “prior acts date” on the Declarations, and
    - 2. no **insured** knew or could have reasonably foreseen that such **incident** might be expected to be the basis of a **Claim** or **Suit** on the effective date of this policy.

The Company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as **Damages** to which this insurance applies and the Company shall have the right and duty to defend any **Suit** against the **Insured** seeking **Damages** on account of such **Bodily Injury, Property Damage or Personal Injury**, even if any of the allegations of the **Suit** are groundless, false or fraudulent, but the Company shall not be obligated to pay any **Claims** or **Claims Expenses** or judgments or continue to defend any **Suit** after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

\* \* \*

## VI. WHEN CLAIM IS CONSIDERED AS FIRST MADE

A **Claim** shall be considered as being first made when the Company first receives written notice from the **Insured** advising that a **Claim** has been made and providing the details of the **Claim**.

1 All **Claims** arising out of the same or related **incident** shall be considered  
2 as having been made at the item the first such **Claim** is made, and shall be  
3 subject to the same limit of liability and only a single deductible, if any,  
4 shall apply.

5 \* \* \*

6 IX. DEFINITIONS

7 When used in this policy (including endorsement forming a part hereof):  
8

9       **“Bodily Injury”** means bodily injury, sickness or disease, mental anguish,  
10 psychological injury or emotional distress sustained by any person,  
11 including death at any time resulting therefrom;

12       **“Claim”** means a demand for money or the filing of **Suit** naming the  
13 **Insured** and, in either case, alleging a **Bodily Injury, Property Damage**  
14 or **Personal Injury** as a result of an **Incident**.

15 \* \* \*

16       **“Damages”** means compensatory judgments, settlement or awards but  
17 does not include punitive or exemplary **Damages**, fines or penalties, the  
18 return of fees or other consideration paid to the **insured**, or the portion of  
19 any award or judgment caused by the multiplication of actual **Damages**  
20 under federal or state law. However, if a **Suit** is brought against the  
21 **Insured** with respect to a **Claim** for alleged acts or omissions falling  
22 within the scope of coverage afforded by this insurance seeking both  
23 compensatory and punitive or exemplary **Damages**, then the Company will  
24 afford a defense to such action, without liability however, for payment of  
25 such punitive or exemplary damages;

26 \* \* \*

27       **“Incident”** means any act or omission in the rendering of or failure to

1 render services by the **Insured**, or by any person for whom the **Insured** is  
 2 legally responsible, in the conduct of the business or professional  
 3 occupation specified in the Declarations.

4 Any such act or omission together with all related acts or omissions shall  
 5 be considered one “**Incident**” and be subject to the same limit of liability;

6 \* \* \*

7 “**Suit**” means a civil proceeding in which **Damages** because of **Bodily**  
 8 **Injury, Property Damage or Personal Injury** to which this insurance  
 9 applies are alleged. “**Suit**” includes:

- 10 A. an arbitration proceeding in which such **Damages** are claimed and  
 11 to which the **insured** must submit or does submit with the  
 12 Company’s consent; or
- 13 B. any other alternative dispute resolution proceeding in which such  
 14 **Damages** are claimed and to which the **Insured** submits with the  
 15 Company’s consent.

16 17. United National issued to Cirrus as named insured a claims-made-and-reported  
 professional liability insurance policy effective from January 27, 2006, to January 26, 2007, with  
 18 policy number AH-0000267 (the “United National policy”)

19 18. The United National policy states as follows:

20 [From Form CPA-119(2.2005):]

## 21 SECTION I—PROFESSIONAL LIABILITY COVERAGE

### 22 1. Insuring Agreement

23 We will pay those sums that the insured becomes legally obligated to pay  
 24 as “compensatory damages” as a result of a “wrongful act.” This insurance  
 25 applies to injury only if a “claim” for damages to which no other insurance  
 26 applies, because of the injury is first made against the insured and reported  
 27 to us during the “policy period.” This insurance does not apply to injury  
 28 caused by a “wrongful act” that takes place outside of the “covered

territory" or was committed before the Retroactive Date shown in the Declarations or after the "policy period."

a. A "claim" by a person or organization seeking damages will be deemed to have been made when notice of such "claim" is received and recorded by the insured or by us, which ever comes first;

\* \* \*

c. We will have the right and duty to select counsel and to defend any "suit" seeking damages. However, we will have no duty to defend the insured against any "suit" seeking damages for injury to which this insurance does not apply

\* \* \*

## 2. Exclusions

This insurance does not apply to:

\* \* \*

s. Any "claim," "suit," or "wrongful act" that might result in a "claim" or "suit," of which any insured had knowledge or could have reasonably foreseen, at the signing date of the application for this insurance.

\* \* \*

## SECTION V—PROFESSIONAL LIABILITY CONDITIONS

\* \* \*

### 4. Other Insurance

If other valid and collectible insurance with any other insurer is available to the insured covering a "claim" also covered hereunder (except insurance purchased to apply in excess of the limit of liability hereunder), this insurance will be excess of, and not contribute with, such insurance. If the insured has other coverage with us covered a "claim" also covered by this policy or coverage Part, the insured must elect which policy or Coverage

1 Part will apply and we will be liable under the Coverage Part so elected  
2 and will not be liable under any other policy or Coverage Part.

3 \* \* \*

4 **5. Representations**

5 By accepting this policy, you agree:

- 6 a. The statements in the Declarations and application, made part of  
7 this policy, are accurate and complete;  
8 b. Those statements are based upon representations you made to us;  
9 c. We have issued this policy in reliance upon your representations;  
10 and  
11 d. This policy embodies all of the agreements existing between you  
12 and us or any of our agents relating to this insurance.

13 \* \* \*

14 **SECTION VI—DEFINITIONS**

15 \* \* \*

- 16 3. “Bodily injury” means bodily injury, sickness or disease sustained by a  
17 person, including death resulting from any of these at any time.  
18 4. “Claim” means a written demand upon the insured for “compensatory  
19 damages,” including, but not limited to, the service of “suit” or institution  
20 of arbitration proceedings against the insured. “Claim” includes reports of  
21 accidents, acts, errors, occurrences, offenses or omissions which may give  
22 rise to a “claim” under this policy. “Claims” based on or arising out of the  
23 same act or interrelated acts of one or more insured will be considered to  
24 be based on a single “wrongful act.”

25 \* \* \*

- 26 11. “Suit” means a civil proceeding in which damages for injury to which this  
27 insurance applies are alleged. “Suit” includes an arbitration proceeding  
28 alleging such damages to which you must submit or submit with our

1 consent.

2 12. “Wrongful act” means any act, error or omission in the furnishing of  
3 professional social services. It includes the furnishing of food, beverages,  
4 medications or appliances in connection with those services. All  
5 “wrongful acts” committed in the furnishing of professional social services  
6 to any one person will be considered one “wrongful act.” All interrelated  
7 “wrongful acts” of one or more insured will be considered one “wrongful  
8 act.”

9  
10 [From Form EPA-909 (5/2006):]

11 This endorsement modifies insurance provided under the following:

12 PROFESSIONAL LIABILITY COVERAGE PART

13 Paragraph 12. of SECTION VI.—DEFINITIONS is deleted and replaced by the  
14 following:

15 12. “Wrongful act” means:

16 a. any act or omission in the furnishing of healthcare services  
17 to a patient or client including the furnishing of food,  
18 beverages, medications, medical treatment or appliances in  
19 connection with such services and the postmortem handling  
20 of human bodies.

21 b. All “wrongful acts” committed in the furnishing of services  
22 to any one patient or client will be considered one  
23 “wrongful act.” All interrelated “wrongful acts” of one or  
24 more insured will be considered one “wrongful act.”

25  
26 19. United National is informed and believes, and on that basis alleges, that Interstate  
27 and/or Fireman’s Fund agreed to defend and indemnify Cirrus in connection with the *Tracy*  
28 pursuant to the terms and provisions of the Interstate policy.

1                   FIRST CLAIM FOR DECLARATORY JUDGMENT—DUTY TO DEFEND

2         20.    United National incorporates by reference the allegations of paragraphs 1-15 of  
 3 this counterclaim.

4         21.    An actual controversy has arisen and now exists between United National,  
 5 Fireman's Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties  
 6 under the Interstate and United National policies regarding the underlying *Tracy* action. United  
 7 National contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were  
 8 required to defend Cirrus in connection with the *Tracy* action, and that United National had no  
 9 obligation to defend Cirrus in connection with the *Tracy* action. On the other hand, United  
 10 National is informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and  
 11 Roes 1 through 10, contend that they had no obligation to defend Cirrus in the *Tracy* action and  
 12 that United National alone was obligated to defend Cirrus in the *Tracy* action, or, alternately, that  
 13 Fireman's Fund, Interstate, and United National were jointly obligated to defend Cirrus in  
 14 connection with the *Tracy* action. United National requests this Court to make and enter its  
 15 binding judicial declarations in accordance with United National's contentions set forth in this  
 16 paragraph. The requested declarations are both necessary and proper at this time under the  
 17 circumstances in that the interest of judicial economy and substantial justice will be served  
 18 thereby.

19

20                   SECOND CLAIM FOR DECLARATORY JUDGMENT—DUTY TO INDEMNIFY

21         22.    United National incorporates by reference the allegations of paragraphs 1-15 of  
 22 this counterclaim

23         23.    An actual controversy has arisen and now exists between United National, Fireman's  
 24 Fund, Interstate, and Roes 1 through 10 concerning their respective rights and duties under the  
 25 Interstate and United National policies regarding the underlying *Tracy* action. United National  
 26 contends that Fireman's Fund, Interstate, Roes 1 through 10, or any of them, were required to  
 27 indemnify Cirrus in connection with the *Tracy* action, and that United National had no obligation  
 28 to indemnify Cirrus in connection with the *Tracy* action. On the other hand, United National is

1 informed and believes, and on that basis alleges, that Fireman's Fund, Interstate, and Roes 1  
2 through 10, contend that they had no obligation to indemnify Cirrus in the *Tracy* action and that  
3 United National alone was obligated to indemnify Cirrus in the *Tracy* action, or, alternately, that  
4 Fireman's Fund, Interstate, and United National were jointly obligated to indemnify Cirrus in  
5 connection with the *Tracy* action. United National requests this Court to make and enter its  
6 binding judicial declarations in accordance with United National's contentions set forth in this  
7 paragraph. The requested declarations are both necessary and proper at this time under the  
8 circumstances in that the interest of judicial economy and substantial justice will be served  
9 thereby.

10       24. If the Court enters a judicial declaration in accordance with United National's  
11 contentions set forth in the preceding paragraph, United National is entitled to recover from  
12 defendants Fireman's Fund, Interstate, and Roes 1 through 10, or any of them, \$100,000, plus  
13 prejudgment interest under Cal. Civ. Code §§ 3287(a) and 3289(b), to reimburse United National  
14 for its contribution toward the settlement of the *Tracy* action.

15

16       WHEREFORE, United National prays for judgment as follows:

- 17       a. That the Court make and enter a binding judicial declaration of the parties'  
18           respective rights and duties in accordance with United National's contentions set  
19           forth in paragraph 17 above,
- 20       b. That the Court make and enter a binding judicial declaration of the parties'  
21           respective rights and duties in accordance with United National's contentions set  
22           forth in paragraph 19 above,
- 23       c. That the Court order and enter a money judgment requiring counterdefendants  
24           Fireman's Fund, Interstate, Roes 1 through 10, and any of the them, to reimburse  
25           United National \$100,000, plus prejudgment interest under Cal. Civ. Code  
26           §§3287(a) and 3289(b), for the money it contributed to settlement of the *Tracy*  
27           action.
- 28       d. That United National be awarded its costs of suit incurred herein; and

1 e. For such other and further relief as the Court deems just and proper.  
2  
3

4 Respectfully submitted,  
5  
6

NIELSEN, HALEY & ABBOTT LLP

7 Dated: June 5, 2008 By: 

8 Thomas H. Nienow

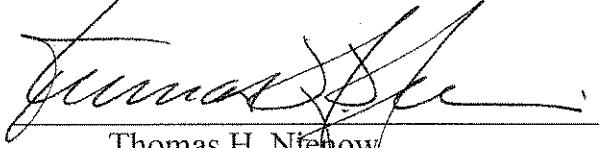
9  
10 Attorneys for Defendant and Counterclaimant  
11  
12 UNITED NATIONAL INSURANCE COMPANY

**DEMAND FOR JURY TRIAL**

13 Defendant and counterclaimant United National Insurance Company demands trial by jury in  
14 this action.

15 Respectfully submitted,  
16  
17

NIELSEN, HALEY & ABBOTT LLP

18 Dated: June 5, 2008 By: 

19 Thomas H. Nienow

20 Attorneys for Defendant and Counterclaimant  
21  
22 UNITED NATIONAL INSURANCE COMPANY

*Interstate Fire & Casualty Company v. United National Ins. Co.*  
United State District Court, Northern District Court No.: C 07-04943 MHP

1  
2                   **PROOF OF SERVICE**  
3

I declare that:

4                   I am a citizen of the United States, employed in the County of San Francisco. I am over  
5                   the age of eighteen years, and not a party to the within cause. My business address is  
6                   44 Montgomery Street, Suite 750, San Francisco, California 94104. On the date set forth below I  
7                   served the following document(s) described as:

8                   **DECLARATION OF THOMAS H. NIENOW IN SUPPORT OF UNITED  
9                   NATIONAL'S MOTION FOR LEAVE TO AMEND COUNTERCLAIM**

10                  [ ] (BY FACSIMILE) by transmitting via facsimile the document(s) listed above to the  
11                  fax number(s) set forth below, or as stated on the attached service list, on this date.

12                  [ ] (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in  
13                  the United States mail at San Francisco, California.

14                  [ ] (BY PERSONAL SERVICE) I caused such envelope(s) to be delivered by hand this date  
15                  to the offices of the addressee(s).

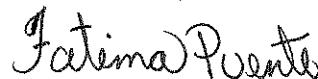
16                  [ ] (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an  
17                  overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it  
18                  is to be served.

19                  [ X ] (BY ELECTRONIC SERVICE) by submitting an electronic version of the document(s)  
20                  to be served on all parties listed on the service list on file with the court as of this date.

21                  Attorney for Plaintiff, Fireman's Fund Ins.  
22                  Co.

23                  Christopher J. Borders  
24                  Casey A. Hatton  
25                  Hinshaw & Culbertson LLP  
26                  One California Street, 18th Floor  
27                  San Francisco, CA 94111  
28                  Tel: (415) 362-6000  
                Fax: (415) 834-9070

29                  I declare under penalty of perjury that the foregoing is true and correct and that this  
30                  declaration was executed on June 20, 2008, at San Francisco, California.

31                    
32                  \_\_\_\_\_  
33                  Fatima Puente